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DE CONCEPTU "RITUS"

CODEX Iuris Canonici postquam canone 1 Orientalis Ecclesiae disciplinam a Iure Ecclesiae Latinae probe distinxit, omnes Codicis commentatores in operibus suis breviter saltem de ritibus orientalibus sermonem facere consueverunt. Nihilominus nonnullae quaestiones ad ritus pertinentes accuratiore quadam investigatione indigere videntur, nobisque hic aliqua placet de ipso conceptu ritus disserere. Licet enim iam ante nonnullos annos de hac quaestione scripserimus,[1] alia addenda sunt, alia corrigenda vel saltem melius proponenda.

Antequam vero ipsam investigationem nobis propositam aggrediamur, aliqua praemittere iuvat de historica "ritus" evolutione, quae iuvabunt ad posteriora melius intelligenda. Primis christianae religionis saeculis in rebus liturgicis et disciplinaribus, iuxta opinionem hodie a plerisque doctis receptam, magna inter varias ecclesias varietas vigebat. Exceptis quibusdam regulis valde antiquis quae ubique servabantur, singulae regiones, singuli fere loci proprios usus sequebantur. Certae sane ecclesiae principales quae vel ob originem apostolicam vel ob urbis magnitudinem momentumque vel tamquam aliarum ecclesiarum matres multum valebant, proprios mores et consuetudines vicinis quoque ecclesiis transmiserunt. Sed haec vita et libera receptione facta sunt, non legibus et coactione. Paulatim tantummodo maiorem uniformitatem imponere coeperunt, praesertim postquam ad finem perducta est constitutio patriarchatuum. Patriarchae res liturgicas et disciplinares in toto territorio sibi commisso

1 "De 'ritu' in iure canonico"—*Orientalia Christiana*, XXXII (1933), 96-158.

una eademque ratione ordinare studuerunt, praesertim in Oriente.[2] Quod autem inter ipsos patriarchatus diversitas usuum exstabat, ab omnibus legitimum habebatur neque idcirco controversiae ortae sunt, nisi fidei forte suspicati sunt moribusve periculum inde obvenire.

Qui autem ab una ecclesia ad aliam transierunt, plerumque huius usibus se adaptabant. Celebre est effatum S. Ambrosii a S. Augustino relatum: "Cum Romam venio, ieiuno sabbato; cum hic sum, non ieiuno. Sic etiam tu, ad quam forte ecclesiam veneris, eius morem serva si cuiquam non vis esse scandalo nec quemquam tibi".[3] Certae vero leges de hac re non extitisse videntur. Monachi v. g. si communitatem propriae nationis in terra aliena efformaverunt, saepe ritus proprios quantum licuit, retinebant. Ipsi laici si ecclesiam patrii moris prope habebant, hanc potius quam alias in loco existentes frequentabant. Ita v. g. in tribus monasteriis a S. Paula fundatis moniales latine, graece, syriace divinum officium psallebant, ad s. communionem vero recipiendam se in ecclesiam ipsius loci Bethlehem conferebant.[4] Similiter monachi S. Euthymii separatim armeniace et graece horas liturgicas persolvebant, ad divinam liturgiam celebrandam una conveniebant.[5] Initio saeculi IX monachos franchos in monte Olivarum commorantes, cum se contra Graecos defenderunt quod in recitatione symboli fidei verbum "Filioque" addebant, usus liturgicos patrios servasse videmus.[6] Eodem saeculo Latini Constantinopoli ecclesiam SS. Sergii et Bacchi habuerunt; saeculo proximo mercatores Amalphitani novam ecclesiam B. Mariae V. dedicatam monasteriumque monachorum S. Benedicti fundaverunt. Venetianos quoque et Anglos saeculo XI ecclesias proprias ibi habuisse scimus, Amalphi-

[2] Cf. A. Fortescue, *The Uniate Eastern Churches* (London, 1923), pp. 12, 19.

[3] Ep. S. Augustini *ad Januarium*, ep. 54, c. 2—*P. L.* XXXIII, c. 201.

[4] Hieronymus, *ep.* 108, n. 19—*P. L.* XXII, c. 896.

[5] Vita S. Sabae, ed. Schwartz, *Kyrillos von Skythopolis* (Leipzig, 1939), p. 117.

[6] *P. L.* CXXIX, cc. 1257-1259; *P. G.* XCIV, 206-214.

tanos monasterium in monte Athos.[7] In omnibus his locis sacris cultus secundum ritum latinum perficiebatur.[8] Similiter Romae ecclesiae Graecorum existebant. Ita colonia graeca in " ripa graeca " Tiberis residens ecclesias S. Mariae in Cosmedin, S. Georgii in Velabro, S. Caesarii frequentabat. Haec a saeculo VII aulae imperiali et officialibus inserviebat. Varia monasteria hoc saeculo et posterioribus pro Graecis Romae fundata sunt.[9] Ipse Leo IX in litteris ad Michaelem Caerulareum datis, postquam conquestus est quod patriarcha omnes Latinorum basilicas Constantinopoli clausit, monasteria abbatibus et monachis abstulit, exclamavit: " Ecce in hac parte, Romana ecclesia quanto discretior, moderatior et clementior vobis est! Siquidem cum intra et extra Romam, plurima Graecorum reperiantur monasteria sive ecclesiae, nullum eorum adhuc perturbatur vel prohibetur a paterna traditione, sive sua consuetudine; quin potius suadetur et admonetur eam observare ".[10]

Postquam latens inter utramque Ecclesiam dissidium circa medium saeculum XI apertam separationem produxit, severius sane quoddam iudicium interdum de ritibus orientalibus prolatum est. Difficulter enim illo tempore quaestiones fidei et disciplinae disiungebantur. " Filioque " in recitatione symboli omittens, nonne erroneis opinionibus ad id movebatur? Qui azymorum usu reiecto in pane fermentato consecrabant, nonne ita sententias schismaticorum probabant? Tamen Romani Pontifices ritus orientales numquam reprobaverunt. In Italia meridionali Graeci ut antea mores proprios in liturgia

[7] B. Leib, *Rome, Kiev et Byzance à la fin du XI siècle* (Paris, 1925), p. 82 ss. ubi uberiores indicationes.

[8] Vide v. g. saevitias ab satellitibus patriarchae Michaelis Caerularii contra latinos exercitas quod sacras species in azymo consecratas conservabant—C. Will, *Acta et scripta quae de controversiis eccl. graecae et latinae saec. XI composita extant* (Lipsiae 1861), p. 164.

[9] F. Antonelli, " I primi monasteri di monaci orientali in Roma "—*Revista di Archeologia Cristiana,* V, (1928), 105-121; F. Dvornik, *Les légendes de Constantin et de Méthode vues de Byzance* (Prague, 1933), p. 285 ss.

[10] *P. L.* CXLIII, c. 764.

et disciplina servaverunt.[11] Innocentius III sane imperio byzantino expugnato dure de ritibus graecis loquens, Ecclesiam graecam ad certos saltem usus Ecclesiae Romanae traducere voluisse videtur. Si quando ita senserit, mox se id assequi non posse intellexit. Concilium Lateranense ab eo congregatum ita expresse declaravit: "Licet Graecos in diebus nostris ad obedientiam sedis apostolicae revertentes fovere et honorare velimus, mores ac ritus eorum, in quantum cum Domino possumus, sustinendo; in his tamen, illis deferre nec volumus nec debemus, quae periculum generant animarum et ecclesiasticae derogant honestati. . . ."[12] Quod a concilio stabilitum erat, posteriores quoque Pontifices Honorius III, Innocentius IV, Alexander IV, praesertim vero Eugenius IV in concilio oecumenico Florentino multique alii usque ad nostra tempora confirmaverunt.[13] Licet autem regula quae ritus orientales conservandos edixit, saepius proponeretur, de extensione quae ei danda erat, non eadem cum certitudine constabat. Summi Pontifices interdum Orientales monuerunt ut certos ritus et usus latinos adoptarent, ita v. g. Innocentius III Maronitis praecepit, ut sacramentum chrismatis a solis episcopis conferendum curarent, ut s. chrisma ex solis oleo et balsamo conficerent, ut campanis uterentur etc.[14] Benedictus XIV iussit Italo-Graecos in impedimentis consanguinitatis et cognationis spiritualis servare gradus in iure latino prohibitos etc.[15] Sed tales ordinationes exceptiones sunt et ex adiunctis facile explicantur. Generaliorem quandam normam stabilivit Congregatio particularis S. Congregationis de Propaganda Fide in domu Card. Pamphili die 4 iunii 1631 habita, in qua definitum est "graecos et alios sedibus patriarcharum schis-

[11] Cf. v. g. P. P. Rodotà, *Dell' origine, progresso e stato presente del rito greco in Italia* (Romae, 1758).

[12] Mansi, XXII, cc. 989, 990.

[13] "De 'ritu' in iure canonico", p. 97 ss.; A. Petrani, *De relatione iuridica inter diversos ritus in ecclesia catholica* (Romae, 1930), p. 14 ss.

[14] T. Anaissi, *Bullarium Maronitarum* (Romae, 1911), p. 3; idem postea statuerunt Leo X, (*Op. cit.*, p. 47) et Gregorius XIII, (*Op. cit.*, p. 72).

[15] § VIII, nn. V et VI—*Codicis I. C. Fontes*, I, p. 749.

maticorum subditos comprehendi legibus pontificiis 1. in materiis dogmatum fidei, 2. si Summus Pontifex explicite mentionem eorum faciat, 3. si implicite de eis disponat ".[16] Quae norma quamquam numquam authentice confirmata est, de facto tam ab Orientalibus servata est, quam a S. Sede, uti agnovit Benedictus XIV et S. Congregatio de Propaganda Fide.[17] Secundum eam disciplina orientalis de se diversa a disciplina latina habetur, exceptis determinatis quibusdam capitibus. Pro diversitate disciplinae vero inter ipsos Orientales varii ritus distingebantur.[18] Haec vox nunc complexum legum liturgicarum et disciplinarium designavit; antea de singulis moribus usurpabatur. Contra hanc evolutionem saeculo XIX Romae voci ritus sensum magis liturgicum restituere nisi sunt, v. g. Pius IX in constitutione *" Non sine gravissimo "* ad Armenos directa, in qua dicitur non parvam differentiam intercedere inter ritum et disciplinam.[19] Ultra processit Secretarius Commissionis " super missionibus et Ecclesiis ritus orientalis " ad praeparandum concilium Vaticanum institutae. Hic aliique sodales huius Commissionis " dualismum inter disciplinam orientalem et occidentalem " auferendum et ius latinum eis applicandum esse iudicaverunt, excepta materia liturgica late intellecta aliisque quibusdam capitibus quae Orientalibus applicari non possent, cum deficeret materia, v. g. quae ad beneficia, capitula etc. pertinerent.[20] Haec provocata erant difficultatibus natis ex oppositione aliquorum Orientalium qui contra ordinationes S. Sedis necessitatibus temporum providentes disciplinam orientalem in omnibus intactam servandam esse exceperunt, ad confirmationem rituum

[16] Mansi, L, c. 36*; cf. " De ' ritu ' in iure canonico ", p. 121 ss.

[17] Cf. const. *" Allatae sunt "*, § 44—*Codicis I. C. Fontes,* II, p. 473 *et Collectanea S. Congregationis de Propaganda Fide* (Romae, 1907), II, n. 1578, p. 165. V. quoque " De ' ritu ' in iure canonico ", p. 122 ss.

[18] Ita Benedictus XIV in const. *" Allatae sunt "* quattuor ritus distinguit: graecum, armenum, syriacum, cophticum, § 3—*loc. cit.,* p. 458.

[19] *Collectio Lacensis,* II, col. 571 d.

[20] Mansi, L, c. 28* ss., c. 45*; XLIX, c. 987. Cf. " De ' ritu ' in iure canonico," p. 99.

orientalium provocantes. Ceterum quae in Commissione propositae sunt, auctoritatem nunquam acceperunt neque vim habuerunt ad praxim S. Sedis mutandam.

Eodem tempore quo notio ritus clarius efformata est, vinculum quoque quo fideles proprio ritui coniunguntur, firmius et stabilius evasit. Antiquis temporibus, uti vidimus, ritus territorialis potius naturam legis induerat, licet verum praeceptum conformandi se in omnibus moribus regionis nondum exstiterit. Primus ne quis latino ritu deposito ritum graecum sequeretur, lege prohibuit Nicolaus V constitutione "*Pervenit ad aures*".[21] Saeculo XVI Summi Pontifices idem praeceptum saepius statuerunt contra clericos qui ut sibi cum uxore cohabitare liceret, propria auctoritate ritum graecum assumpserant.[22] Cum autem ex imprudenti illegitimoque studio latinisationis Orientalium cum Ecclesia unioni non parva damna evenirent, eadem prohibitio ad ritus orientales quoque extensa est. Urbanus VIII quidem Ruthenorum ad latinum ritum transitum omnino prohibere in animo habuit, sed decretum iam editum ob resistentiam regis, nobilitatis, cleri latini retrahere coactus, interdictum pro solo clero statuere potuit. Sed paulatim, praesertim opera Benedicti XIV haec norma generalis evasit et SS. Congregationes decretis, responsis, instructionibus disciplinam aliquam uniformem in hac materia introduxerunt.[23] Haec deinde transierunt in Codicem Iuris Canonici.

In Codice I. C. non omnia determinantur quae ad ritus pertinent, sed multa ex iure vigente supponuntur vel tacite confirmantur. Commentatores Codicis plerumque definitionem accuratam non proponunt, sed recte notare solent ritum non solum res liturgicas, sed etiam ius canonicum comprehendere.[24] Ritus iuxta significationem de qua agimus in-

[21] *Collectio Lacensis*, II, c. 601 c.

[22] V. g. Pius V, *Bullarium S. Congregationis de Propaganda Fide* (Romae, 1839), I, p. 11.

[23] *Collectio Lacensis*, II, c. 603 ss.

[24] Ita etiam J. A. Duskie, *The Canonical Status of the Orientals in the United States* (Washington, 1928), p. 13. Definitionem bonam tradit G.

tellectus definiri potest: *Coetus fidelium qui propriis regitur legibus et usibus antiqua traditione innixis, non solum quod ad res liturgicas sed etiam ad canonicam disciplinam attinet, et qui tamquam autonomus et a ceteris distinctus a S. Sede agnoscitur.*

Dicimus autem ritum *coetum fidelium* non Ecclesiam, cum sub hac voce generatim coetus propria hierarchia instructus intelligatur, ritus autem licet convenientius propriis episcopis regatur, existere possit etiam sine his; Malabarenses et Italo-Graeci per multa saecula Episcopis latinis subiecti erant.

In illis deinde quae sequuntur elementum materiale et elementum formale distinguere licet. Ante omnia requiritur ut habeatur suppositum quod ritum formare valeat. Est autem coetus fidelium qui *propriis regitur legibus et usibus antiqua traditione innixis,* i. e. legibus et usibus ei propriis sive quod iam a primis Ecclesiae temporibus vel per diuturnum saltem tempus in eo servantur, sive quod innituntur principiis quibusdam fundamentalibus traditione receptis, quin omnis evolutio et adaptatio, ut manifestum est, excludatur. Porro requiritur ut et usus comprehendant *tam liturgiam quam disciplinam canonicam.* Habentur sane ritus quidam in Ecclesia latina in quibus propria et peculiaris liturgia servatur, v. g. ritus ambrosianus, mozarabicus et ritus certorum ordinum ut Ordinis Praedicatorum, sed isti in re iuridica ius commune latinum sequuntur. Proinde non sunt ritus eo sensu qui obtinet in Codice I. C. Ad ritum sensu iuridico constituendum opus est ut magna saltem pars disciplinae propriis legibus et usibus regatur; quae leges et usus ex parte antiqui sunt, v. g. praeceptum triplicis immersionis in administratione baptismi, usus fermentati in SS. Eucharistia, etc., ex parte antiqua traditione innituntur licet ipsae normae originis recentioris sint, v. g. multae praescriptiones quae spectant iura et obligationes patriarcharum.

Michiels, *Principia generalia de Personis in Ecclesia* (Lublin, 1932), p. 260: " Ecclesia determinata, quatenus peculiaribus regitur legibus et usibus, non solummodo ad universam liturgiae formam quod attinet, sed etiamvero quod spectat ad hierarchicam constitutionem, regimen atque disciplinam ".

Haec omnia quasi elementum materiale ritus efformant, cum ad ritum constituendum requirantur, sed non sufficiant. Ritus enim est institutum iuridicum quod a competente auctoritate erigendum est. Opus est igitur tamquam elemento formali actu aliquo auctoritatis ecclesiasticae et cum auctoritates inferiores manifeste incompetentes sint ad ritum constituendum, requiritur interventus Sanctae Sedis. Proinde coetus aliquis fidelium formaliter constituitur ritus eo quod *a Sancta Sede tamquam ritus autonomus et a ceteris distinctus agnoscitur.* Haec agnitio vel expresse vel tacite data esse potest. Expressa declaratio verbis ut supra data, numquam facta est. Aequivalenter vero de existentia ritus ab aliis distincti constare potest vel eo quod in documentis S. Sedis nomine peculiari designatur, v. g. ritus ruthenus, ritus rumaenus etc., vel quod propria hierarchia instituitur in territorio in quo iam alia hierarchia extitit, vel quod leges pro solis fidelibus certi ritus latas esse declaratur, vel quod transitus ab uno coetu ad alium sine venia S. Sedis non permittitur, i. e. quod norma can. 98 C. I. C. applicatur.[25]

Definitio a nobis proposita iuri hodie vigenti respondere videtur. Quaeri autem potest, num recta futura sit etiam Codice Orientali a Sancta Sede promulgato, seu aliis verbis num praevideri possit eam promulgata hac nova lege mutandam esse. Duplex enim dubitandi ratio habetur. Nam licet de ipsis normis quae in novo Codice proponentur, nihil notum sit, haec iam statui posse videntur. Primo per promulgationem Codicis Orientalis ius quo Orientales deinceps regentur, formaliter pontificium erit, seu aliis verbis legibus et usibus quibus usque ad id tempus reguntur, abrogatis formaliter normae auctoritate Sanctae Sedis promulgatae in earum locum

[25] Hinc consequitur non solum quattuor vel quinque ritus liturgicos, alexandrinum, antiochenum, armenum, constantinopolitanum, chaldaeum uti hodie designantur, sed ritus quoque ab his derivatos, ut russicum, ruthenum, rumaenum, maroniticum, syriacum etc. vere ritus sensu canonico habendos esse. De divisionibus ab auctoribus propositis consuli potest "De 'ritu' in iure canonico", p. 110 ss. et H. Dausend, *Das interrituelle Recht im Codex Iuris Canonici* (Paderborn, 1939), p. 63 ss. De statu rituum orientalium in Statibus Foederatis bene tractat, J. A. Duskie, *op. cit.*

succedent. Porro ex ipsa rei natura, etsi magnus singularum ecclesiarum respectus habeatur, fieri non potest quin pleraeque normae deinceps omnibus ritibus Orientalibus communes futurae sint. Fatemur has rationes nos imprimis movisse ad definitionem ritus olim propositam corrigendam.[26] Verum difficultatibus quae contra nostram definitionem ex codificatione moveri possunt, nunc sine magno negotio responderi posse videtur. Et primo quidem quod leges et usus non iam auctoritatem legislatoris particularis sed supremi vigebunt, non contentum normarum sed vinculum tantummodo attingit quo imponuntur. Propterea iure " leges et usus proprii " dici pergunt, sicut Decreta synodi Montis Libani semper legislatio propria Maronitarum dicta est, licet ob approbationem a Benedicto XIV in forma specifica datam vim legis pontificiae obtinuerint. Ad alterum vero notare iuvat, hodie quoque similitudinem inter disciplinam variorum rituum existentem maiorem esse quam primo aspectu apparet. Etiam promulgato Codice certae diversitates sive formae liturgicae, sive disciplinae, praesertim illius quae cum liturgia connexa est, manebunt. Ceterum diversitas rituum non ex solis rationibus liturgicis et iuridicis explicanda est, sed etiam rationes historicae et nationales vim ad ritus efformandos habuerunt.

Absoluto iam argumento praecipuo quod nobis proposuimus, iam breviter aliquid de consectariis quae ex natura ritus profluunt, dicamus. Et primo quidem ex eius natura facile intelligitur cur secundum ius actu vigens, naturam habeat ritus legis personalis. Non enim de differentia quadam minore agitur, quae inter usus variorum locorum et regionum extitit et facile mutari possit, sed de legibus et usibus quae attingunt totam fidelium vitam religiosam, culturalem, nationalem. Nostris praesertim temporibus missionarii iure statuunt populos non christianos cultu et humanitate praecipuos non ad mensuram europeam in omnibus reducendos, sed propriam eorum traditionem humanitatemque esse quantum fieri potest,

26 " Ritus est ordo iuris ecclesiastici quo non solum res liturgicae sed universa quoque disciplina unius partis Ecclesiae universalis ordinatur."—" De 'ritu' in iure canonico ", p. 105.

servandam. Ecclesia fidelibus ius vindicare non cessavit custodiendae etiam sub dominatione aliena propriae linguae et "nationalitatis". Id vel magis valere debet cum agitur de traditionibus non profanis, sed religiosis quae ad ipsas vitae christianae origines ascendunt, quae doctrinam et mores SS. Patrum, S. Basilii, S. Ioannis Chrysostomi, S. Ephraem etc. conservant. Huic ritus conceptui omnino consentaneum est ut vim habeat personalem seu sequatur fideles quocumque ierint, salvis legitimis exceptionibus ubi lex ritus cedere debet secundum principia generalia legi loci, v. g. quod attinet ad ordinem publicum servandum, ad res immobiles etc. His iam responsum est quaestionibus quae nonnumquam afferuntur: cur ritus conserventur in regionibus ab Oriente longe distantibus? cur sacerdotes orientales in his regionibus sint instituendi cum multo facilius eorum vitae religiosae provideretur si sequerentur ritum latinum? Fideles ius habent ritus proprii conservandi et postulandi ut si fieri possit, curae sacerdotum proprii ritus concredantur. Non exigendum profecto, ut ritus in regionibus ubi non originarius est, artificialiter conservetur ob rationes quae archaeologiam potius spectant quam vitam. Fieri nequit quin immigrantes in aliud territorium paulatim absorbeantur, neque id malum habendum est. Sed primis generationibus linguae regionis saepe ignaris et proprio ritui ita saepe addictis ut alium ritum neque intelligant neque sequi velint—non affirmamus id probandum esse, sed factum notamus—quantum fieri potest, secundum normas a. S. Sede datas omnino providendum est, ne, ut non raro factum est, omni religione abdicata vel dissidentium coetu expetito grave animae damnum patiantur.

Alterum est quod ex natura ritus normae explicantur quibus fidelium ad certum ritum adscriptio moderatur. Modus enim quo quis certo ritui adscribitur valde differt v. g. a modo quo quis certam dioecesim nanciscitur. Hic translato domicilio etiam subiectio mutatur. Ritus vero ordinarie ipso baptismo determinatur et semel assumptus de se non mutatur. Ritui quem quis baptismo nactus est, de se per totam vitam adscrip-

tus manet. Tamen cum rationes graves mutationis existere possint, Ecclesia permittit ut iustis causis existentibus obtenta venia quis ad alium ritum transeat. Habentur vero differentiae magni momenti inter duos hos modos adscriptionis. Prima adscriptio efficitur non libera voluntate fidelis sed ope legis ex qua certis factis, generatim baptismo in determinato ritu administrato, adnectitur. Subsequens vero adscriptio ab actu voluntatis seu a declaratione voluntatis transeundi pendet. Liceat mihi de hac aliquas observationes addere.

Modus enim transitus in C. I. C. praescriptus rem theoretice consideranti, aliquam admirationem movet. Qui enim ab uno ritu transit ad alium proprio actu se transfert ab uno ordine iuridico ad alium seu *aliis verbis* ipse actu propriae voluntatis vinculum quo certis legibus ligatus erat, solvit et novis legibus se subicit. Certum sane est fidelem id facere non posse nisi obtinuerit licentiam seu veniam Sanctae Sedis. Sed ita difficultas nostra non solvitur. Nam rescripto datur venia transeundi, non transfertur indultuarius; transitus ipse vero eius voluntate efficitur. Talis actus autem de se ad auctoritatem publicam pertinere videtur et transcendere auctoritatem viri privati. Ne quis male mentem nostram interpretetur. Non negamus profecto secundum ius actu vigens indultuarium obtento rescripto valide et legitime ad alium ritum transire, sed quaerimus num talis ratio ordinandi transitum *logica* sit seu respondeat rectis de hac re conceptibus.

Ad hanc rem melius illustrandam breviter recolere iuvat quae iuris civilis internationalis periti de acquisitione " civitatis " docere solent. Distinguunt " civitatem originariam " seu civitatem ipsa nativitate et civitatem subsequenter per " naturalisationem " acquisitam. Quod ad " civitatem originariam " attinet, seu illam quam quis ex ipso ortu habet, duplex principium in variis legislationibus invenitur. Aliae sequuntur " ius sanguinis ", i. e. cives habentur omnes qui licet extra fines Status nati, orti sunt a parentibus civitatem huius Status habentibus. Aliae sequuntur " ius soli ", i. e. omnes qui in territorio Status nati sunt, eo ipso civitate eius donan-

tur, licet parentes ad alium Statum pertineant.[27] (Mittimus omnes limitationes et determinationes ulteriores quae ad rem nostram non faciunt).

Per "naturalisationem" vero civitatem alicuius Status acquirere possunt qui nullam habent civitatem vel qui civitatem originariam mutare volunt. Ibi aliquo facto iuridico independenter a voluntate civitas determinatur; hic intercedit voluntas eius qui civitatem novam acquirere vult. Scriptores anteriores interdum de contractu locuti sunt qui inter Statum et hominem privatum ineatur. Quae sententia omnino antiquata est; hodie iuris periti docent omnes, agi de concessione unilaterali et auctoritativa Status qui personae petenti civitatem suam tribuit. Quod non raro etiam legibus definitur. Ita v. g. secundum legislationem italicam civitas vel per decretum vel per legem oratori concedi potest.[28]

Haec de acquisitione civitatis dicta, aliqua ratione illustrare possunt quae spectant transitum ab uno ad alterum ritum. Non agitur sane heic de duabus rebus publicis ab invicem independentibus, sed de duobus coetibus fidelium qui sub una eademque suprema auctoritate Ecclesiae versantur. Sed hic quoque habentur duo ordines iuridici, diversi, duo coetus, qui propriis legibus reguntur. Naturae huius adscriptionis consentaneum est ut potius ab auctoritate procedat, ut ad ius publicum spectet, actu auctoritativo perficiatur, non actu privato fidelis in huius arbitrio posito. Id ne admittitur in transitu quidem qui de una dioecesi ad aliam perficitur. Nam hic mutatio adscriptionis non immediate efficitur voluntate transeuntis, sed lege quae adscriptionem adnectit acquisitioni domicilii in nova dioecesi.

Quaerimus vero in fine cur Ecclesia res non ita ordinaverit, sed *transitus* non *translatio* ad alium ritum in C. I. C. statuatur. Haec praesertim historice explicanda sunt. Ut vidimus initio novum ritum libere assumpsit qui in alia regione sedem suam fixit. Ritus erat potius lex territorialis. Posterioribus

[27] Cf. v. g. J.-P. Niboyet, *Traité de droit international privé français*, I (Paris, 1938), p. 175 ss., 191 ss.

[28] Nuovo Digesto Italiano, III, c. 186.

temporibus paulatim ritui magis magisqus indoles legis personalis tributa est, praesertim a saeculo XVIII ad ritus orientales melius conservandos. Si in Codice I. C. transitus non translatio statuitur, id maxima ex parte ex indole traditionali iuris canonici explicatur quod conservationis magis amans est quam innovationis. Non desunt vero aliae quoque rationes quibus id suaderi possit. Nam etsi iuri hodie vigenti melius mutatio huius normae responderet, ius " rituale " nostris quoque temporibus continuo evolvitur neque desunt qui ritum iterum ad legem territorialem potius quam personalem reducendum esse censent. Quapropter praematurum fortasse videtur exoptare mutationem tam fundamentalem de cuius exitu non constat.

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THE VICAR GENERAL AND THE SPECIAL MANDATE

IT is an interesting study to analyse the arguments for and against the use of ordinary power by a Vicar General acting with a special mandate. The arguments proposed are naturally intended to clarify this use of power exercised by the Vicar General. But it is unlikely that unanimity of opinion can be arrived at because the divergence of opinion is fundamental. This fundamental divergence of opinion rests upon the interpretations of canon 368, § 1. It is the purpose of this article to examine this canon and compare it with the arguments advanced both for and against the use of ordinary power by a Vicar General acting with a special mandate. It is not to be expected that this brief study will result in definite conclusions. Yet a critical review of the arguments advanced on both sides of the controversy may, perhaps, result in a clarification of the issue.

Before proceeding to this review, it will be well to recall the definition of *Vicar General* and to recall the meaning of vicarious power. If the two concepts contained in the term *Vicar General* be separated, a Vicar General is primarily a vicar. This means that he acts essentially in another's name. A Vicar General is also a person whose work is essentially auxiliary. These ideas are fundamental. The Vicar General does more than merely participate in Episcopal jurisdiction. A dean and a pastor also participate in Episcopal jurisdiction,[1] but, while they have some ordinary power, they are in no sense juridically one with the Bishop nor is their aid in any sense universal. In his definition of *Vicar General,* Cappello [2] stresses the notion of " aid to the Bishop ".

[1] Cf. lib. II, tit. viii, *Codicis Iuris Canonici: de potestate episcopali deque iis qui de eadem participant.*

[2] *Vicarius Generalis est sacerdos deputatus qui potestate ordinaria Episcopum in regenda tota dioecesi adiuvat—Summa Iuris Canonici,* (Romae, 1928), II, n. 394.

It is necessary to understand this thoroughly, for it is the reason for the existence of the office of Vicar General. Vermeersch-Creusen stress a different notion in the definition of a Vicar General.[3] They emphasize the notion that the acts of the Vicar General are to be considered as acts of the Bishop himself. It is equally necessary to understand this thoroughly. It shows the identity of the power of the Vicar General and the power of the Bishop.[4]

A Vicar General, then, is juridically one with the Bishop. The power by which the Vicar General acts is the same power by which a Bishop acts. This concept of the power of the Vicar General is not new, although it was not without controversy before the Code.[5] But the idea of territorially universal aid supplied to the Bishop by the Vicar General was not as commonly taught at the time of Reiffenstuel. He taught that a Vicar General acted in the name of the Bishop in the place where the Bishop usually held his tribunal.[6] In THE CODE OF CANON LAW the territorially universal aid of the Vicar General to the Bishop is set forth in Canon 368, § 1.[7] This territorially universal aid is not now denied.[8] THE CODE

[3] *Vicarius generalis est Sacerdos legitime deputatus ad exercendam in toto territorio jurisdictionem episcopalem vice episcopi ita ut actus eius ab episcopo gesti censeantur—Epitome Iuris Canonici,* (Mechliniae-Romae, 1933), I, 355.

[4] Other definitions of the Vicar General can be found in Campagna, *Il Vicario Generale del Vescovo,* n. 66, The Catholic University of America Canon Law Studies, (Washington, D. C., 1931), p. 5. Campagna compares several definitions with the description of the Vicar General in THE CODE OF CANON LAW and specifies the characteristic notes of the office of Vicar General; cf. p. 6.

[5] Cf. Reiffenstuel, *Jus Canonicum Universum,* lib. I, tit. xxviii, nn. 90-93; a restatement of the arguments on both sides of the controversy can be found in Campagna, *o. c.,* pp. 121-124.

[6] *Ibid.,* n. 14. Reiffenstuel apparently is stressing the judicial element of the Episcopal office. In the Code, the diocesan judge should not normally be the Vicar General. Cf. canon 1573, § 1. Campagna maintains the diocesan judge was always distinct from the Vicar General, *o. c.,* pp. 43-47.

[7] *Vicario Generali, vi officii, ea competit in universa dioecesi jurisdictio,* etc.

[8] There are several decisions of the Roman Congregations before the Code which entirely eliminate any concept of territorially restricted aid of the Vicar General to the Bishop. It should be mentioned, however, that the decisions

of Canon Law has definitely determined the territorial extension of the Vicar General's power.

Vicarious ordinary power is well described by Maroto.[9] There is no need to linger over the various ways in which ordinary power can be either proper or vicarious. It is sufficient to note with Maroto that the characteristics of ordinary power can also be found in vicarious ordinary power. Hence, as is now determined definitely in Canon 197, § 2,[10] vicarious ordinary power is a species of ordinary power. Thus is solved a controversy which led to many distinctions regarding the nature and use of the power of the Vicar General.[11] No longer is it necessary to consider this power as quasi-ordinary.[12] Vicarious ordinary power is, then, power which is derived from an office established in law but which is exercised in another's name. In so far as a Vicar General acts by reason of his office but in the name of the Bishop he acts by vicarious ordinary power.

There is, then, after the promulgation of The Code of Canon Law, no further dispute regarding the nature of the Vicar General's power. Since this article is not intended to prove that this was the better opinion even before the Code, it is not necessary to cite authorities whose doctrine has been adopted by the Code. But the controversy which still continues concerns the nature of the power of the Vicar General when he acts by reason of a special mandate. If this special

concern the use of faculties conceded to the Bishop. This fact does not weaken the force of the argument in the text, for the coextensive use of the Bishop's and the Vicar General's faculties depends on the conception of the office of the Vicar General as an ordinary. Cf., e. g., S. C. S. Off., April 20, 1898, n. 2—*Fontes*, 1198; Sept. 5, 1900—*Fontes*, 1246; Aug. 22, 1906—*Fontes*, 1278. An earlier decision of the Sacred Congregation of the Consistory of June 20, 1676 (*Fontes*, 2840) retains at least an implication of the territorially restricted jurisdiction of the Vicar General. This decision, however, concerns judicial power.

[9] *Institutiones Iuris Canonici*, (Romae, 1921), I, 831-832.

[10] *Potestas ordinaria potest esse sive propria sive vicaria.*

[11] Cf., e. g., Reiffenstuel, *ibid.*, nn. 90-93, 98-100.

[12] Cf. Stutz, *Der Geist des codex iuris canonici*, p. 321; Maroto, *o. c.*, I, 831.

mandate is given, does the Vicar General still act with ordinary power? Or, is a mandate rather interpreted as indicating delegation? The solution of this controversy depends not strictly on the nature of the power of the Vicar General but rather on the extent of the power conceded in Canon 368, § 1. Should the restriction demonstrated by the necessity of a special mandate so effectually limit the extent of the Vicar General's office that the power of his office is essentially less than universal, it must be maintained that a special mandate indicates delegation. Therefore, an act performed with this special mandate is the result of delegated power. Should, however, the restriction in Canon 368, § 1 be considered not as a subtraction but rather as a suspension of power fundamentally universal, a removal of the restriction would merely remove a hindrance to operate. In this way, a special mandate would not indicate delegation but rather an authorization to act. Such an act, then, would be performed by reason of the power of the Vicar General's office and should be considered as ordinary power.

Canonists are divided in their views of the Vicar General's power in the position outlined above. Some canonists maintain that the Vicar General acts by ordinary power even if he needs and, of course, obtains a special mandate.[13] Others assert that delegated power is used in this instance.[14] A critical review of the arguments proposed on both sides of the controversy follows.

Wernz-Vidal open their discussion of the nature of the Vicar General's power with a statement that THE CODE OF

[13] E. g., Maroto, *o. c.*, I, 830; Stutz, *o. c.*, pp. 325-327; Wernz-Vidal, *Ius Canonicum*, (Romae, 1923), II, 678-679; Vermeersch-Creusen, *o. c.*, I, 357: In the edition of the *Epitome* published in 1921, Vermeersch-Creusen (p. 157) maintained that use of a single and separate mandate was of delegated power. This was a repetition of the doctrine of several earlier canonists, e. g., Reiffenstuel, *ibid.*, n. 95.

[14] E. g., Chelodi, *Ius de Personis*, (Tridenti, 1927), p. 330; Kearney, *The Principles of Delegation*, n. 55, The Catholic University of America Canon Law Studies, (Washington, D. C., 1929), pp. 72-74; Campagna, *o. c.*, pp. 133-135; Hilling, *Das Personenrecht des Codex Iuris Canonici*, (Paderborn, 1924), p. 183.

Canon Law introduces no real change in the office of Vicar General.[15] The only difference between the old and the new law is the present exhaustive enumeration of the occasions when a special mandate is necessary.[16] Formerly this exact determination did not exist. After this statement, Wernz-Vidal say that formerly an opinion sufficiently common maintained that the power exercised by a Vicar General acting with a special mandate was ordinary power if this mandate had been conceded at the time when the Vicar General was appointed. If, however, the special mandate were granted later, the power would be considered delegated unless the Vicar General were commissioned to act precisely because he was a Vicar General. Wernz-Vidal call this distinction "rather subtle".[17]

Wernz-Vidal maintain that the Vicar General's power is ordinary even if he is acting with a single special mandate.[18] Their argument is that the office of the Vicar General is capable of restriction and extension. Hence, the concession of a special mandate is nothing more than a cancellation of a restriction imposed by law. Wernz-Vidal see no difference between the restriction imposed by law and the limitations imposed by the Bishop. Nor does it matter much whether this mandate is conceded when the office is conferred or later. Further, while Wernz-Vidal admit that the Vicar General can be delegated, they insist that such delegation must be expressly determined.

Vermeersch-Creusen in the *Epitome Iuris Canonici* published in 1933 [19] receded from their earlier opinion.[20] Now

[15] *O. c.*, II, 677-678.

[16] Wernz-Vidal mention some of the pertinent canons—*o. c.*, II, 677. A complete list can be found in Campagna—*o. c.*, pp. 130-131.

[17] *O. c.*, II, 678; Reiffenstuel, (*ibid.*, nn. 95-96), in maintaining this distinction cites Joannes Andreas, Sanchez, Pirhing and Sbrozius; Garcias is cited by Reiffenstuel as denying this distinction without further qualifications.

[18] *O. c.*, II, 679.

[19] I, 357.

[20] *O. c.*, I, (ed., 1921), 157.

these canonists maintain that ordinary power is exercised even if a special mandate is necessary for operation. They offer two reasons why this opinion is held. The first reason indicates a comparison with the doctrine regarding actions performed as the result of authorization.[21] Their second reason is based on the terminology of THE CODE OF CANON LAW. Nowhere in the Code is delegation insinuated whenever a special mandate is required by the Vicar General. The Code always speaks of a special mandate, never of delegation. Consequently, the concession of a special mandate is nothing but an extension of the Vicar General's office. In support of their arguments Vermeersch-Creusen cite Canon 2002.[22]

Maroto also maintains that the Vicar General acts with ordinary power whenever he operates with a special mandate. However, Maroto does not attempt to support his position with any argument.[23] He merely states that a special mandate grants additional power to the Vicar General who thereafter acts by virtue of his office and not as the delegate of the Bishop.[24]

The best arguments for the contention that delegated power is conceded by a special mandate are outlined by Kearney.[25] Kearney begins with the statement that ordinary power is annexed by law to an office. "But the common law has effectively despoiled the office of certain functions. Therefore, instead of being attached by law to the office, these rights

[21] *Primo quia melius cohaeret cum doctrina de mandatario*—Vermeersch-Creusen do not elaborate on this idea either here or where they consider *mandatarius* in penal legislation—*o. c.*, III, 230; when they consider a procurator (c. 1657, § 1), Vermeersch-Creusen merely say *cum vices tantum partis agat*—*o. c.*, III, 41; Coronata (*Institutiones Iuris Canonici* [Taurini, 1933], III, 86), describes a procurator as *persona quae aliena negotia mandato domini administrat.*

[22] *In canonibus qui sequuntur, nomine Ordinarii non intelligitur Vicarius Generalis, nisi habuerit mandatum speciale.* This canon is part of the introduction to the law of beatification and canonization.

[23] Maroto, however, has some interesting remarks regarding mandated power in Roman and Canon Law—*o. c.*, I, 839.

[24] *O. c.*, I, 830.

[25] *O. c.*, pp. 72-74.

have been detached by law from the office."[26] The conclusion, which Kearney draws, is that the further competence of the Vicar General is determined by a "mandate *ab homine*"; this is something quite different from a "disposition *a jure*".[27]

Kearney criticizes the assumption made by Wernz-Vidal which equalizes the restrictions made in law and those imposed by the Bishop himself. Kearney denies there is a parity between these restrictions, and emphasizes that if the restriction made by the Bishop be removed no really new grant of power is made. The Vicar General's powers revert to the concessions of the Code. This is not the case if a special mandate is given. There a power not conceded by the Code is granted. It must, then, be delegated power.[28]

Chelodi likewise contends that a special mandate confers delegated power. His argument is not proposed as extensively as Kearney's, but it is fundamentally the same argument.[29] In a footnote, Chelodi observes that the old law considered this aspect of the power of the Vicar General to be ordinary power.[30] Although Chelodi does not directly say this opinion can no longer be held, he does hint that the accurate determination of the Vicar General's office in the new law should indicate that delegated power results from a special mandate.[31]

The consideration of the arguments offered on both sides of the controversy reveals some variations of details, but the

[26] *O. c.*, p. 72.

[27] *O. c.*, pp. 72-73.

[28] Campagna repeats the arguments of Kearney almost verbatim—*o. c.*, pp. 134-135. While Campagna adds nothing new to the discussion at hand, he is to be consulted on the analysis of the operations of several Vicars General appointed *in solidum* according to the prescriptions of Canon 366, § 3 (cf. p. 104). Campagna also analyses the power conceded to a Vicar General for Religious, etc. (cf. p. 105).

[29] *O. c.*, p. 330.

[30] *Ibid.*, footnote 4. Chelodi cites Reiffenstuel as outlining the doctrine of the old law.

[31] *L. c.*

principal contention is clearly seen. Does Canon 368, § 1 concede to the Vicar General only part of the ordinary jurisdiction of the Bishop or does it concede all this jurisdiction but immediately, as far as exercise is concerned, impose certain practical restrictions?

There is no doubt that at first sight the power of the Vicar General seems to be essentially limited by the clauses *exceptis iis quae Episcopus sibi reservaverit, vel quae ex iure requirant speciale Episcopi mandatum.* The Canon concedes complete jurisdiction, and the exception seems to be subtraction from the power just conceded. If this is actually the correct interpretation of Canon 368, § 1, the words *ea competit in universa dioecesi jurisdictio . . . quae ad Episcopum iure ordinario pertinet* would seem to be poorly chosen. The proper interpretation of Canon 368, § 1 would then mean that there may be more items in which the Vicar General is by office competent to act than there are items in which he is incompetent to act. This would result in an arithmetical interpretation without any real reliance on a juridical principle. Such interpretation is scarcely to be expected in law. Undoubtedly the total operations of an Ordinary could be determined by definite number but this would hardly be the intention of the legislator. Rather, it should be expected that the legislator would lay down a principle upon which interpretation should rest.

If Canon 368, § 1 be interpreted as embodying a principle of law which determines the office of Vicar General, there can be little doubt that the most important and fundamental item is expressed in the words *ea competit . . . jurisdictio . . . quae ad Episcopum iure ordinario pertinet.* This means that complete jurisdiction [32] is granted to the Vicar General by reason of his office.[33] There is a parity between the words "*ea*" and "*quae*".

[32] Campagna (*o. c.*, p. 126) calls the Vicar General's jurisdiction in law "morally universal".

[33] For judicial jurisdiction the Code prefers a separate official. Cf. Canon 1573, § 1.

It must not be imagined that such interpretation of Canon 368, § 1 is asserted without study of the context in which the italicized words of the preceding paragraph are found. After all, the law contained in Canon 368, § 1 is not found in a simple sentence. Hence division of items is not only possible but altogether necessary. The important thing is to determine which item is fundamental. In the interpretation given in the preceding paragraph, it is maintained that the fundamental item is asserted by the words "*ea*" and "*quae*". To maintain that the ablative absolute clause beginning with "*exceptis*" and the relative clause beginning with "*quae*" are equally fundamental with the idea contained in the words "*ea*" and "*quae*" would really nullify the entire idea of the Vicar General's complete jurisdiction. Yet these last mentioned words do evidently assert the coextensive ordinary jurisdiction of the Bishop and the Vicar General. It would be meaningless for the law to assert parity and immediately destroy it.

This argument involves no defect of logic. It is not asserted without argument that the Vicar General has complete jurisdiction and therefore any contrary interpretation is incorrect. The Vicar General's complete jurisdiction is not assumed. It is rather submitted that complete jurisdiction is intended fundamentally by the words "*ea*" and "*quae*". It is also submitted that this is the real meaning of the Vicar General's office. Therefore the fundamental extent of the power of the Vicar General is not assumed but demonstrated by an analysis of the Canon 368, § 1. This demonstration is, of course, based on the division of the items recorded in this Canon and on an endeavor to learn which item is more fundamental.

The restrictions placed upon the power of the Vicar General can be considered either as subtraction from complete jurisdiction, or as prohibitions suspending competence to act.

If the restrictions found in Canon 368, § 1 are actually subtractions from the Vicar General's complete jurisdiction, they immediately curtail his power so that he cannot really be said

to be a vicar with anything like complete power. Does the law intend this? Does the law call a man a Vicar General and immediately and fundamentally deny him suitable powers? If one is persuaded that Canon 368, § 1 does not embody any substantial change in the nature and extent of the power of the Vicar General from the law existing before the Code, one is forced to admit that the concession of special mandate is not really a transfer of power but rather a release of restricted or suspended power.[34] Consequently, the acceptance of a mandate is not the acceptance of delegation but the acceptance of authorization.

Chelodi, however, seems to think that the exact determination in the Code of the cases in which a special mandate is required renders it necessary to abandon the interpretation of the old law regarding a special mandate.[35] This can scarcely be seriously maintained, for no new concept of the office is introduced in the Code, nor is the power of the Vicar General essentially altered. The mere fact of numerical determination of specific items does not change either the concept of the office or the nature of the power contained therein. Wernz-Vidal correctly intimate that all the Code has done is to supply an exhaustive list of cases where a special mandate is required.[36]

If the restrictions found in Canon 368, § 1 are prohibitions entailing suspended jurisdiction, their presence in no way militates against the concept of the Vicar General's fundamentally complete jurisdiction. By demanding the necessity of special mandate before the Vicar General can act, the legislator indicates his definite preference for the personal exercise

[34] Cf. Canon 6, 2°; cf. also Reiffenstuel, *ibid.*, n. 94. Commenting on the concession of special mandate at least when the office of Vicar General is conferred, Reiffenstuel, citing Joannes Andreas, Sanchez, Pirhing, etc., maintains that such concession of mandates involves ordinary power. He says "*tota jurisdictio vicarii generalis erit ordinaria.*" He cites even Garcias as favoring this opinion.

[35] *L. c.*

[36] *O. c.*, II, 678.

of Episcopal jurisdiction. There are many reasons why the legislator may prefer the Bishop to act personally rather than to permit the Vicar General to act. Most of these reasons will be founded on the importance of the act to be performed or on the importance of the object to be obtained. For instance, is is of the utmost importance that excardination and incardination be brought about by the Bishop himself.[37] Hence it is not at all unexpected that the Vicar General should be prohibited from acting without a special mandate. Another example could be the convocation of a diocesan synod.[38] Legislation in the diocese is of great importance, and there is every reason why it should be restricted by law to the Bishop himself. A third and excellent example is the restriction in Canon 1104. This canon prohibits a Vicar General from permitting a secret marriage (*matrimonium conscientiae*) without a special mandate. The canon emphasizes the need of the gravest and most urgent cause before such a marriage can be permitted. There should be no wonder that such a marriage should depend in law on the personal judgment of the Bishop.

It cannot, of course, be said with certainty that the restrictions in Canon 368, § 1 are not subtractions from the jurisdiction of the Vicar General. But it may be affirmed that an interpretation which demands definite curtailment is not the only interpretation possible and perhaps not even the better interpretation.

The contention of the Vicar General's fundamentally complete jurisdiction is challenged by the argument proposed by Kearney. Kearney maintains that "the common law has effectively despoiled the office of certain functions."[39] As Kearney continues, these rights have been detached from the office. Kearney, therefore, considers the office of Vicar General more with an eye on the restrictions than with regard to

[37] Cf. Canon 113.

[38] Cf. Canon 357, § 1.

[39] *O. c.*, p. 72.

the fundamental concept of the Vicar General's office. If Kearney's opinion is true, the office of the Vicar General is in no sense complete, and as a result we have the anomaly of a Vicar General whose fundamental powers are not general. The name of the office would be retained, but the concept of the office would not correspond to the name. This, of course, is possible, but is it probable? As was mentioned above, are we to assume that the law of the Code has introduced so fundamental a change in the office of the Vicar General? [40] In his treatment of the nature of the power of the Vicar General acting by virtue of a special mandate, Kearney does not discuss the rather common opinion regarding the nature of such power. He is satisfied to say that before the Code it was not clear that the Vicar General enjoyed ordinary power.[41] Possibly, he means that it was not the unanimous opinion before the Code that the Vicar General enjoyed ordinary power. Chelodi, however, whose doctrine on the nature of the special mandate Kearney cites with approval, admitted the preponderance of opinion in the old law on the side of the Vicar General's ordinary power.[42]

If Kearney's concept of the office of the Vicar General is true, the application of Canon 197, § 1 [43] follows automatically. Whenever a Vicar General acts by virtue of a special mandate, he acts with delegated power.

Kearney supports his contention by concluding that a "mandate *ab homine*" is different from a "disposition *a iure*".[44] This cannot be denied. But Kearney apparently as-

[40] Cf. decrees of the Holy Office before the Code (*Fontes*, nn. 1198, 1246, 1278) where faculties conceded to the Bishop are also conceded to the Vicar General who is included under the name "ordinary". Cf. especially the decree of the Holy Office, Sept. 5, 1900 (*Fontes*, n. 1246) where it is mentioned that even faculties conceded to the Bishops by name are also conceded to their Vicars General.

[41] *L. c.*

[42] *L. c.*

[43] *Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio; delegata, quae commissa est personae.*

[44] *O. c.*, pp. 72-73.

sumes that a mandate is necessarily the transfer of jurisdiction. This is not true. The Code of Canon Law in many instances where it speaks of mandate, does not even conceive of jurisdiction. Canon 203, § 1 [45] is a clear case of delegation, but the canons which speak of a mandate regarding advocates and procurators exclude the idea of jurisdiction.[46] The same is true of the mandate required for postulators and vice-postulators in the beatification and canonization of saints.[47] In all these canons a mandate is certainly "*ab homine*", but no jurisdiction is transferred. A mandate merely means authorization to act. In fact, where the qualities [48] of a procurator or an advocate are determined by law no provision is made for the transfer of jurisdiction. Procurators and advocates may even be laymen who are incapable of exercising jurisdiction.[49]

A mandate, then, does not necessarily mean a transfer of jurisdiction. There is no valid reason for maintaining that it must mean such transfer when it is used of the power of the Vicar General. It can very well mean that the Bishop merely authorizes the Vicar General to act.

It should be mentioned here that the nature of the mandate does not really touch the real point at issue. If the Vicar General does not fundamentally possess complete jurisdiction, a mandate given to him to act jurisdictionally must contain delegated power. But, if the Vicar General does possess fundamentally complete jurisdiction, the mandate may only release power hitherto restricted. Thus ordinary power would be used. It is useful, however, to know that no solid argument can be based on the words "*mandatum speciale*". [50]

[45] *Delegatus qui ... mandati sui fines excedit, nihil agit.*

[46] Cf. Canons 1659, § 1; 1661; 1662.

[47] Cf. Canons 2005, 2006.

[48] Cf. Canon 1657, § 1, § 2; cf. also Coronata, *o. c.*, III, 90.

[49] Cf. Canon 118.

[50] Kearney (p. 73) has an unusual argument based on the presence of the clause "*nisi ex mandato speciali.*" He says this clause removes any doubt that the Vicar General can be delegated in the pertinent canons. This is an

Before proceeding to the discussion of other arguments it can be assumed that the writer considers Wernz-Vidal's argument relative to the extent of the Vicar General's power as more convincing than the argument proposed by Kearney. The Vicar General's office is here considered to be an office capable of extension and restriction. The concept of fundamentally complete jurisdiction is asserted as the correct interpretation of Canon 368, § 1.

Kearney devotes some time to challenging an assumption made by Wernz-Vidal. The latter canonists [51] assume that there is no difference between the restriction resulting from the necessity of a special mandate and the restriction imposed on the Vicar General's jurisdiction by the Bishop himself. Wernz-Vidal argue that if the Bishop removes the restriction which he himself had imposed, the Vicar General would thereafter act with ordinary power. The same release of ordinary power would result if a special mandate were granted. Kearney attacks this position by denying parity between the two cases.[52] He says that the removal of a restriction formerly imposed by the Bishop would concede neither ordinary nor

extraordinary interpretation of Canon 199, § 1. This canon demands a clear clause denying power to delegate before the Bishop's power to delegate determined in this canon is restricted. The mere statement in the law (e. g., *non autem Vicarius Generalis*) that the Vicar General is incompetent to act restricts indeed his own power to act but in no way renders him incapable of receiving delegation. Hence, the clause "*nisi ex mandato speciali*" does not indicate that he can be delegated. For instance, in Canon 2168, § 1 the Ordinary is expected to make the necessary admonition to a cleric accused of non-residence. No mention at all is made of the Vicar General. Does this mean that there is doubt whether the Vicar General can be delegated? No reason for such doubt exists. Cf. Coronata, *o. c.*, III, 496. But it should be noted that Canon 2168, § 1 says "*Ordinarius moneat*", while Canon 2148, § 1 says "*ipsemet Ordinarius . . . invitet*". The latter expression could be interpreted as excluding delegation; cf. Connor, *The Administrative Removal of Pastors*, (Washington, D. C., 1937), p. 83. Kearney, however (pp. 77-78), gives the usual interpretation of Canon 199, § 1 in discussing examples where delegation is actually prohibited. He cites, e. g., Canons 401, § 1; 873, § 1 with 874, § 1.

[51] *O. c.*, p. 679.

[52] *O. c.*, p. 73.

delegated power. On the other hand, a special mandate would confer power. If Kearney's main contention be admitted, the special mandate would in fact confer power not contained in the office. If, however, this contention be denied, the special mandate would not confer but rather release power already and fundamentally included in the office of the Vicar General. In so far, at least, Kearney's argument and its answer can be resolved into the framework of the position described in detail earlier.

There is some difference between the restriction of the Vicar General's power in law and the limitation imposed upon it by the Bishop himself. Yet this difference must not be overemphasized and carried to unwarranted conclusions. After all, it is the same law which imposes restrictions on the power of the Vicar General and which authorizes the Bishop to make further limitations. Both restrictions are equally supported by law, and both concern the same power. It is difficult to see how the nature of the Vicar General's power is affected no matter how these restrictions are removed. In both cases it is the Bishop who removes them. Whether or not in granting a special mandate the Bishop confers new power, and, therefore, delegated power, depends on the original and fundamental extension of the Vicar General's power. Again, then, Kearney's remarks must be studied with the arguments already described in detail.

Both Wernz-Vidal and Kearney develop their argument consistently. If the premise of either be admitted, the reasonable development of their argument cannot be denied. But Wernz-Vidal's argument is preferred because it is better supported by the concept of the office of Vicar General.

With the main point of the controversy sufficiently explored, it remains to consider the remaining arguments briefly. Vermeersch-Creusen,[53] contending for the constant use of ordinary power by the Vicar General even if he acts by virtue of a special mandate, maintain that this view is more in harmony with the notion of authorization. While these

[53] *O. c.*, I, 357.

canonists do not elaborate on the reason they assign for their opinion, their contention is easily admitted by recalling the instances in the Code where a mandate means no more than mere authorization to act.[54] Another reason offered by Vermeersch-Creusen is founded on the terminology of the Code. This reason of itself is not convincing, for the terminology of the Code varies at times. Yet it is true that the Code repeatedly speaks of granting a special mandate to the Vicar General. It does not speak of delegating him. Hence, some support for authorization and not delegation can be drawn from this terminology.

Vermeersch-Creusen adduce Canon 2002. This canon gives support to their argument, for in this canon it is indicated that the Vicar General is not understood as an Ordinary unless he acts by virtue of a special mandate.[55] Similar legislation can be found in a decree of the Sacred Congregation of the Consistory[56] issued a few years before the promulgation of The Code of Canon Law. The study of the terminology of Canon 2002 and of the decree of the Sacred Congregation of the Consistory show that when the Vicar General uses power authorized by a special mandate, he acts as an Ordinary. He should, then, possess ordinary power.

There is no need to discuss again Chelodi's intimation that the exact determination of the cases where a special mandate is required introduces a change in the law regarding the office of the Vicar General. But it may be repeated that such determination in no way affects the nature of the power of the Vicar General. While an exhaustive list of cases where the special mandate is required is new in the Code, such necessity for a special mandate existed before the promulgation of the Code. Nevertheless, the rather common opinion as indicated

[54] Cf. e. g., Canons 1659, § 1; 1661; 2005.

[55] Canon 2002 is an introductory canon to the law on the beatification and canonization of saints. It reads: *In canonibus qui sequuntur, nomine Ordinarii non intelligitur Vicarius Generalis, nisi habuerit mandatum speciale.*

[56] *Maxima cura*, 20 Aug. 1910. *Ordinarii nomine ... non venit Vicarius Generalis, nisi speciali mandato ad hoc sit munitus*—Canon 32 (*Fontes*, n. 2074).

by Wernz-Vidal[57] and admitted by Chelodi himself[58] considered power used by virtue of a special mandate as ordinary power.

A word of practical importance will close this article. The discussion entered into in the preceding pages was largely theoretical. But from the determination of the theory of the Vicar General's office the practical conclusion to be drawn is that at all times, unless he be specifically and expressly delegated when a mandate is actually denied him, the Vicar General is an Ordinary with jurisdictional power fundamentally coextensive with the jurisdiction of the Bishop himself. Further practical conclusions regarding delegation by the Vicar General himself are obvious.

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[57] *O. c.*, p. 678.

[58] *O. c.*, p. 330, footnote 4.

Cases and Studies

THE OPPOSITION TO THE OREGON FREE TEXTBOOK BILL *

In 1931 the Oregon legislature passed a law which provided that children attending elementary public schools should have the free use of textbooks.[1] In 1941 the law was amended to extend the free use of textbooks to all children attending *standard* elementary schools.[2] The 1939 legislature had made free bus transportation available to *all* elementary school children,[3] but arguments used in an attempt to defeat the bill showed the great necessity for an explanation of correct principles. Consequently during the next two years (the Oregon legislature meets biennially) a select group of Catholic laymen were imbued with these principles. Then Catholic legislators were correctly informed concerning these principles and finally non-Catholic legislators were acquainted with them. A statement of these principles is, of course, immediately available in canons 1372-1375, C.I.C. and in Pope Pius XI's encyclical letter, *Divini illius Magistri.*[4]

* Reprints available.

[1] Laws '31, Chap. 61, O. C. L. A. 111-2015, *et seq.*

[2] *Oregon Laws*, 1941, Chap. 485, O. C. L. A. 111-2015,

[3] Laws '39, Chap. 352, O. C. L. A. 111-874.

[4] Particularly pertinent are the words of this encyclical: "Nemo tamen obiiciat, fieri omnino non posse, ut ea respublica, quae homines diversa quod ad religionem sentientes complectitur, puerorum institutioni aliter consulat quam per scholas quae neutrae ac mixtae vocantur, cum, contra, ipsa respublica civium eruditioni prospicere et prudentius debeat et facilius queat, si Ecclesiae familiarumque hac in re coepta operamque libere perfici atque adhiberi sinat, aequis praeterea alteram alteramque fovendo muniendoque subsidiis. Id autem, magno cum familiarum gaudio itemque profectu publicae sive eruditionis sive tranquillitatis, effici posse, ea plane demonstrant, quae videmus usu venire apud quasdam nationes, in quibus, etsi alii aliam religionem sectamve sequuntur, ordo dispertitioque scholarum nullo pacto iura familiarum offendunt, non solum quod pertinet ad doctrinas (praesertim cum illic catholici ludi catholicis adolescentibus praesto sint), sed etiam quod spectat ad aequam rectamque sumptuum compensationem a republica collatam scholis illis quas familiae iure suo postulant.

The declarations of the Holy Father constitute the motive and the motive power for the present gesture of justice to Oregon parents of children attending private schools. It is to be carefully noted, however, that any claim to direct public aid for private schools is thought to be impracticable, at least under present circumstances and in any one state alone. The Oregon free transportation law and free textbook law have for their object the child and not the school.[5] Even if the confirmed "secularist" would not agree with Dr. Richard J. Gabel's statement that "both the history of our federal and state governments and the practice of certain foreign countries indicate that aid to church schools does not constitute a church establishment",[6] he cannot with any semblance of reason hold that free transportation or free textbooks constitute a threat to "separation of church and state". As Dr. George Johnson says: "There would be as much logic to forbidding the Catholic child the use of tax-supported streets and sidewalks on his way to school as in depriving him of tax-supported bus transportation or tax-provided school lunches [*and may we add, Dr. Johnson: tax-provided textbooks*]. To conjure up the bugaboo of Church and State in this connection is nothing more than a cowardly refusal to face the facts and to meet them in an American way".[7]

Soon after the Oregon legislature convened on January 12, 1941 an informal poll of the legislators' opinions indicated that a text-

At vero in aliis, mixtae item religionis, nationibus res se longe aliter habent, haud exiguo cum catholicorum hominum detrimento; qui, auspicibus ducibusque Episcopis et sacerdotibus omnibus utriusque cleri opem ferentibus, pecunia dumtaxat sua scholas sustentant ad filios suos recte instituendos—memores ut sunt gravissimi quo obstringuntur officii—et, laudabili liberalitate ac constantia, in suo perstant proposito, illud tamquam insigne suae actionis praeferentes ut scilicet 'omni catholicae iuventuti catholicam educationem in scholis catholicis' omnino provideant. Quod quidem coeptum, etsi sumptu publico minime fulcitur, ut lex iustitiae postularet, tamen a magistratibus praepediri ac vetari nullo modo potest, nisi ii velint sacra familiae iura conculcare et germanae libertatis nervos infringere."—*A. A. S.*, XXII (1930), 78.

[5] "No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious service in either house of the legislative assembly." —Oregon Constitution, Article I, paragraph 5.

[6] *Public Funds for Church and Private Schools* (1937), p. 765.

[7] *Catholic School and American Democracy*, p. 80—quoted by Gabel, *op. cit.*, p. 762.

book bill, then in tentative form, would have a good chance of passing. Put into final form, the bill was introduced one month later, February 14, 1941. A non-Catholic member of the House and one of the Senate, both Masons, both from districts not metropolitan, sponsored the bill. Immediately upon its introduction into the State Senate, organized opposition got under way. First of all, efforts were made to eviscerate the bill by amendments. Failing in that, the opposition tried delaying tactics, which were partially successful. Finally, however, the Senate Committee on Education, to which the bill had been referred, sent the bill to the floor with a majority " do pass " report; there was no minority report. Only one senator spoke against the bill, but he was ineffectual and easily rebutted. Before the bill was brought out on the floor of the Senate, votes sufficient to pass it had been mustered and it passed easily—18 to 9—with three Senators absent. Reliable information indicated that 11 of the 18 favorable votes were by Masons.

With the bill about to come before the House of Representatives, there was reason to think that the House Committee on Education would be, at least in part, actuated by bigotry. Consequently the Speaker was persuaded to refer the bill to the Committee on Revision of Laws. From this point onward the organized opposition, hitherto working hiddenly, had to expose itself a bit. The secretary of the Oregon jurisdiction of Scottish Rite (bodies) and several prominent members of the secret brotherhood now came forth in open opposition. Before a public hearing of the committee they raised the spectre of Romish cohorts attempting to violate the democratic principle of separation of church and state, to undermine the public school system, bulwark of democracy *et ita porro, ad nauseam.* On leave, however, on March 13 the committee reported the bill to the House with a majority vote " do pass ". Discomfited but not yet dismayed, the brethren canonized in c. 2335 arranged for a House member to move the bill be re-referred—now to the Committee on Education. They were not fortunate in their representative, however. Under the influence of the spirit which dulls and does not quicken, he jumped to his feet, before the clerk had finished reading the title of the bill, and made his motion. One of the sponsors of the bill, himself a Mason, be it remembered, then explained to the House just why the bill had been referred as it had been, and the motion was lost. Then followed debate upon the merits of the bill. All the tactics, maneuvers and political tricks

known to parliamentary practice were used to sabotage the bill by putting hidden pressure upon the legislators. Galleryites who for years have observed at close range the proceedings of the Oregon legislatures were reminded of the old K.K.K. days when the same arguments, couched in the same words, were dragged out in the abortive attempt of 1922 to do away entirely with private elementary schools in Oregon. However, be it said to the everlasting credit of Oregon legislators of 1941, when the textbook bill came to a vote, it passed easily, 41-19, and from the best information available, 29 of the 41 affirmative votes were cast by Masons.

With the textbook bill successfully through the legislature, pressure—really tremendous pressure—was put upon the Governor of Oregon to the end that he would exercise his right of veto, and thus prevent the bill from becoming law. While the Governor hesitated, giving, unofficially, one reason and then another why he considered that the textbook bill should not become law (among other reasons it was reported that the Governor wished to keep Catholics from being persecuted!), skullduggery developed aplenty. In fact, only by a narrow margin did the bill escape the gubernatorial veto, for the Governor, it is reliably reported, had actually written *veto* on the back of the bill and handed his veto message to the press, when, at the last instant he changed his mind, erased the *veto* from the bill, withdrew his message from the press and filed the bill, without his signature, two days before the time for filing expired. In so far as any attempt was made to rationalize opposition to free textbooks for all young Oregonians, this editorial, from the *Morning Oregonian* of March 17, 1941, with its half-truths, false implications and lack of logic, may be taken as typical of such opposition: "The bill under which the state, through the textbook commission, would supply free textbooks to private and parochial schools, is before the governor for signature or rejection. It should not have passed. We say that in spite of absolute support of the private and parochial schools in their right of existence. It is not sufficient that the private and parochial schools are patronized by people who are taxpayers. The public schools are agencies of government, with the details of their conduct subject to publicly chosen governing bodies. The private schools are not. When they chose their independent role they knew that it would be an added expense. They should not now expect the taxpayers to meet these expenses. But they are. First they asked it in the matter of school busses. Now they ask textbooks".

By Oregon law any legislative enactment must be submitted to popular vote, if demanded within ninety days following the adjournment by 5% of the legal voters who voted for justices of the Supreme Court at the last preceding regular election.[8] On April 23, 1941 "The Association Against Public Taxes for Private Schools" filed with the Secretary of State a preliminary petition, subsequently circulated for signatures, asking a referendum on the textbook bill. The Secretary of State transmitted copies of the petition to the Attorney General, who prepared a ballot title to be used upon the referendum petition when it would be circulated for signatures and also upon the official ballot when the measure would be submitted to the voters. This ballot title was transmitted to the Secretary of State and by him furnished to the sponsors of the referendum. According to Oregon statute the ballot tile shall contain:

> 1. a distinctive short title in not exceeding ten words by which the measure is commonly referred to or spoken of and which shall be printed in the foot margin of each signature sheet of the petition;
>
> 2. a general title which may be distinct from the legislative title of the measure expressing in not more than 100 words the purpose of the measure.[9]

Furthermore the following standard is prescribed: "In making such ballot title the Attorney General shall to the best of his ability give a true and impartial statement of the purpose of the measure and in such language that the ballot title shall not be intentionally an argument or likely to create prejudice either for or against the measure".

The short title in this case was: "Bill Providing for Free Textbooks for Private Standard Elementary Schools" (this in large type). The general title was: "Bill Providing for Free Textbooks for Private Standard Elementary Schools—Purpose: Amending the law to require the board of directors of every school district to provide textbooks for free use of all pupils residing in such district and actually attending private standard elementary schools, upon the same conditions and requirements as for pupils attending the district public schools; defines a standard school as one that meets the state board of education standards and all teachers therein engaging

[8] Oregon Constitution, article IV, paragraph 1.

[9] O. C. L. A., 81-2106.

in classroom instruction hold valid Oregon teaching certificates of the proper level" (this in small type).

Senator Rex Ellis and Representative Allan C. Carson, sponsors of the textbook bill in the Senate and House, on May 14 appealed to the State Supreme Court from the decision of the Attorney General providing the aforementioned ballot title, contending that the title was not a true and impartial statement, as contemplated by the Oregon statute but on the contrary was "a flagrant attempt to mislead the voters and make the official ballot an instrument of prejudice against the measure".[10] The "Association against Public Taxes for Private Schools" had presumed to have its name printed also upon the referendum petition and the appellants did not fail to observe that "the statement of sponsorship on the referendum petition is wholly unauthorized, and like the ballot title itself is designed to deceive the voters and create prejudice against the act". Two of the most effective citations of the appeal to the Supreme Court were from the U. S. Supreme Court case, *Cochran v. Louisiana Board of Education,* 281 U. S. 370, and the Mississippi Supreme Court case, *Chance v. Mississippi State Textbook Board,* 200 So. (A.S.) 706.

On June 6, 1941 the Supreme Court heard the appeal and immediately the ballot title was declared to be invalid. This decision does not appear in the Oregon Reports, but is a matter of Court record. As June 13 was the final day for filing referendum petitions, the sponsors had not sufficient time to print and circulate other petitions, bearing a corrected ballot title. This shortness of time, however, was of their own making for they themselves had failed to exercise their right to demand an immediate hearing upon the objections filed to their referendum petition. Nevertheless, despite the Supreme Court's decision, they did file the petitions already signed, bearing the invalid ballot title. The Secretary of State rejected the petitions upon the ground that they did not contain a sufficient number of valid signatures. Upon examination it appeared that many of the signatures were illegal in that either names and addresses were not complete or no notary public had certified them. The Attorney General of Oregon, with obvious reluctance, advised the Secretary of State to declare that the referendum petition was unacceptable. Whereupon the "Association

[10] Brief, p. 6.

Against Public Taxes for Private Schools" instituted *mandamus* proceedings to compel the Secretary of State to file the petitions. When it was found that the Attorney General, acting for the Secretary of State, refused to plead all the reasons why the referendum had been refused—specifically he chose to disregard the decision of the Supreme Court—the sponsors of S. B. 259 intervened. In the Circuit Court of the State of Oregon [11] the trial judge ruled that the illegal ballot title rendered the petitions invalid. The decision was not appealed.

Textbooks, supplied by the State of Oregon (with others which the state does not supply, e. g. catechisms and certain types of readers and histories) are now being used by the pupils of all standard elementary parochial schools in the state.

Opposition to the Oregon Textbook Bill came from these elements:

1—Scottish Rite Masons. The local Masonic groups, as such, did not organize opposition to the textbook measure, although several individuals in official position did so. One of these, the secretary of a certain group in Portland, stated that the heads of the Masonic Order in Oregon received instructions from the National Headquarters of the Masonic Order in Washington, D. C. to "go down to Salem and defeat the bill".

2.—Lutherans. This opposition was not organized but manifested itself in letters to members of the legislature and letters to the daily papers.

3—Christian Scientists. This opposition was largely under cover and not particularly active.

4—Seventh Day Adventists. Their magazine "Liberty, A Magazine of Religious Freedom", published in Washington, D. C., has carried many bitter articles against the Textbook Bill, as it did before against the Bus Bill. In the magazine for the "First Quarter, 1942", there is an editorial, over the initials "H. H. V." which closes: "Just what the next step of those who oppose Free Textbooks for other than public schools will be has not been determined as we go to press. Apparently, however, there is a very determined group that intends to explore every means to prevent the use of tax funds for the benefit of private and sectarian schools."

5—The Portland morning newspaper. This paper carried an editorial against the bill, advising the Governor to veto it. Later on

[11] Clerk's # 29574.

this newspaper professed to regret its action because of a great number of subscription cancellations. However, frequently thereafter, under the guise of printing news articles, the newspaper injected misleading and argumentative matter against the bill whenever opportunity arose.

6—One man, active in Methodist circles, and a prominent Mason, who is quite antagonistic to the Catholic Church and who at one time was superintendent of schools in the City of Portland, stirred up a great deal of opposition against the bill and was an officer in the "Association Against Public Taxes for Private Schools". It was he who persuaded the Portland School Board to pass a resolution condemning the bill and who also induced many Portland school teachers to circulate referendum petitions against the bill. Those who signed the petitions, incidentally, were largely from three groups: employees of the Portland Public School System; insurance agents, representatives of various Protestant denominational societies.

It would seem rather out of order, even to the most confirmed bigot, to promote disunity between groups of citizens by direct attack upon the Oregon Text Book Law during the present national crisis. It is just possible, therefore, that for the duration of the war at least, Oregon's gesture to those who exercise their natural and constitutional rights to educate their children in circumstances of their choice, may go unchallenged.

PETRINUS

FREE TEXTBOOKS IN MISSISSIPPI

The statute in Mississippi, approved February 16, 1940, granting free textbooks to school children in parochial schools, was part of a comprehensive revision of the school law, adding twenty-six sections to Chapter 202. Section 23 stated: "[Plan] This act is intended to furnish a plan for the adoption, purchase, distribution, care and use of free textbooks to be loaned to the pupils in the elementary schools of Mississippi. The books herein provided by the board shall be distributed and loaned free of cost to the children of the first eight grades in the free public elementary schools of the state, and all other elementary schools located in the state, which maintain elementary educational standards equivalent to the

standards established by the state department of education for the state elementary schools."

This statute was upheld by the Supreme Court[1] (In Banc) on February 24, 1941, passing on an appeal from a decree denying an injunction against the state board and dismissing the bill. The opinion was delivered by Alexander, J. The suit was maintained as a taxpayers' suit in which the complainants had appealed to the Attorney General, the official authorized to act but prevented inasmuch as he had appeared as representative of the board.

The opinion is remarkable for its keen analysis of the constitutional provision for the separation of church and state. It argued that only the control of one over the other is forbidden. The Constitution does not require that the state should be godless or even that it should ignore the privileges and benefits of the church. Much less does it require that the church should be a liability to citizens by depriving them of privileges to which they are entitled as citizens because they happen to belong to a certain church. Separation does not imply incompatibility between religion and politics. "The state has the duty to respect the independent sovereignty of the church, as such" and "to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, and who regardless of any other affiliation are primarily wards of the state".

Perhaps the opinion was not completely conscious of the innuendo contained in it, hinting at a possible lack of religious motive in the complainants and at a possible attempt on their part to exercise as a church control over the state. The Court said that under the constitutional provisions for freedom of conscience, a citizen is free to exhibit the fruits of his religious training in recognizing the needs of the citizen and the right and duty of the state to minister to them and that the state in so doing should be free from unwarranted hindrance in the name of religion. The state, therefore, permitting the pupil to hold any religious creed, should not, because he exercises that right, exclude him from benefits common to others. There is no religious qualification for public office, nor should there be for public privileges available to the citizen.

[1] *Chance et al. v. Mississippi State Textbook Rating & Purchasing Board et al.*, 190 Miss. 453.

INVALID ASSISTANCE AT MARRIAGE

Paul, one of my parishioners, desires to contract marriage with a Catholic, also a member of my parish. Paul narrates to me that he was previously married by my predecessor, on October 12, 1928, but in a church in the adjacent parish. That previous marriage was cantracted with a Catholic woman with a dispensation from the banns. It was a validation of a civilly contracted marriage. The facts are that the couple appeared late at my rectory and found that the pastor had gone to the neighboring parish to hear the confessions of the Sisters teaching there, as he was their ordinary confessor. The couple followed him and he, in haste, complained that they were late, but nevertheless took them into the parish church, calling two Sisters to witness the marriage, saying that if the pastor were home he might know some lay persons who could be called as witnesses. Now in my matrimonial register, the blank space following a marriage performed on October 8, 1928, quite obviously once contained an entry of marriage. A close inspection of the erasure with a lens reveals the name of Paul as the groom, but his surname is not discernible. So also the surname of the woman named by Paul as his previous wide can be discerned, but not her first name. No return was made to the marriage bureau of the county. Nothing more can be detected in my register but what I have described. My predecessor is dead. The Chancery register contains an entry of the dispensation from the banns. Can the Ordinary declare this marriage null for lack of form?

PAROCHUS.

If in a similar case the canonical form had been completely omitted, the Ordinary could declare the marriage null in a summary review of the evidence. In this case, on the assertion of the petitioner himself, the external form was observed, the invalidity of the marriage depending on the pastor's lack of jurisdiction outside the territory of his parish. There is consequently a *species matrimonii*. The investigation of the validity of this act is no longer a mere inquiry into Paul's free state, as it would be if the form had been neglected. It is a case to be decided on formal trial.[1]

In any event, there are doubts of sufficient probability to require formal procedure, but these doubts are the result precisely of the fact that the form was observed. The visiting pastor could have obtained delegation from the pastor of the parish where the marriage was celebrated. The fact that the latter was not present when the ceremony took place is no proof that he did not see his visitor prior

[1] Cf. art. 231, Instructio S. C. de Sacramentis, 15 augusti, 1936—*AAS*, XXVIII (1936), 313-361.

to his departure. The chance remark of the officiating priest that the pastor would have called some lay persons to be witnesses to the marriage, had he been at home, is not conclusive of the fact that he was not at home when the visiting priest first arrived. It is, of course, some evidence of the fact that he did not give delegation. If he had, he would also have called the witnesses. The inference is justified that either he was not at home when his visitor arrived or that neither of them knew that the couple would ask to be married in that place. But the inference should be based on detailed testimonial evidence and should be made by judges formally constituting a tribunal.

An inference must be made further that there was either no virtual delegation by the resident pastor or by the local Ordinary or no acceptance of such virtual delegation on the part of the officiating priest. This inference seems fully justified on the face of the petitioner's story, but it should be based on testimonial evidence and should be made by the tribunal.

A similar need appears in the inspection of the marriage register. The present pastor is not entitled to make judicial inferences in this matter. Many inferences are latent in this erased entry. First, the entry was made by the previous pastor; second, the entry was a record of Paul's marriage; third, the previous pastor made the erasure; fourth, he made it because he knew the marriage was invalid due to his lack of jurisdiction. But these inferences are to be made by a formal court.[2]

It seems clear that Canon 209 is not applicable as the problem is not whether the officiating priest was considered by common error to have authority to assist at the marriage. If the question were raised, even though the great weight of opinion excludes common error as sanating the defect of particular delegation, the court would be obliged to hold in favor of validity.[3] The question would be, was there common error? It is not shown in the query that there was.

[2] Cf. Canon 1818, as to the first three inferences.

[3] Cf. Miaskiewicz, *Supplied Jurisdiction according to Canon* 209, n. 122, The Catholic University of America Canon Law Studies (Washington, D. C., 1940), pp. 271-279. Cf. The Jurist, II (1942), 170-172.

CONFIRMATION BY A PRIEST

George, son of a father of the Latin Rite, was taken by his mother, member of an Oriental Rite, to her pastor for baptism. I have his baptismal certificate and on it is recorded that he was also confirmed at the time of the baptism. George is in the Confirmation class in my parish. Should I present him to the bishop for Confirmation with the other children?

PAROCHUS.

Priests of certain Oriental rites enjoy the faculty of confirming subjects of their own rite, and when they enjoy this faculty they can validly confirm subjects of other Oriental rites if its priests also enjoy this faculty.[1] The priests of the Maronite Rite do not possess this faculty.[2]

As to priests of the Ruthenian Rite, the Apostolic Letter, *Ea semper,*[3] declared that they did not enjoy it in the United States. The decree of the Sacred Congregation for the Propagation of the Faith, *Cum Episcopo,*[4] did not refer to it. Duskie, in preparing his dissertation in the School of Canon Law, wrote to the Ordinariate for the Ruthenians in the United States from Galicia, and received the reply that the restriction had been removed.[5]

But Canon 782, § 5, forbids priests of an Oriental rite enjoying the faculty for children of their own rite to confirm children of the Latin rite;[6] indeed, the penalty was suspension under a decree of the Sacred Congregation for the Propagation of the Faith, which, inasmuch as it is not repeated in the Code, is abrogated.[7]

[1] Cf Cappello, *De Sacramentis* (3. ed., Taurinorum Augustae, 1938), I, nn. 844 ss.; Coleman, *The Minister of Confirmation,* n. 125, The Catholic University of America Canon Law Studies (Washington, D. C., 1941), pp. 124-130.

[2] Cf. Vermeersch, "Casus"—*Periodica,* XVI (1927), 120*.

[3] 14 iun. 1907—*ASS,* XLI (1908), 7.

[4] 17 aug. 1914—*AAS,* VI (1914), 458-463.

[5] *The Canonical Status of the Orientals in the United States,* n. 48, The Catholic University of America Canon Law Studies (Washington, D. C., 1928), p. 95, footnote 28.

[6] "Nefas est presbyteris ritus orientalis, qui facultate vel privilegio gaudent confirmationem una cum baptismo infantibus sui ritus conferendi, eandem ministrare infantibus latini ritus."—Canon 782, § 5.

[7] 5 iul. 1886—*Coll. S. C. P. F.* (Romae, 1907), n. 1660. "Quod ad poenas attinet, quarum in Codice nulla fit mentio, spirituales sint vel temporales, medicinales vel ut vocant, vindicativae, latae vel ferendae sententiae, eae tanquam abrogatae habeantur"—Canon 6, 5°.

Blat says that the word "*nefas*" in Canon 782, § 5, renders Confirmation invalid if conferred by a priest of an Oriental rite on a child of the Latin rite.[8] Others hold that the act is only illicit.[9] In virtue of Canon 15 therefore, the Confirmation is to be held valid, at least not to be repeated. This was the tenor of a decree of the Holy Office in 1885,[10] which, however, permitted conditional Confirmation to be conferred privately if the person involved was to be promoted to tonsure or holy orders or if he or his parents requested it. This decree placed both exceptions in the same category; therefore it would seem that it imposed no obligation in either case or imposed an obligation in both. The latter interpretation seems justified by the context. This, however, since the promulgation of the Code, does not square with the general rule laid down by Canon 15. Therefore, it would seem to be abrogated.[11]

The conclusion is, therefore, that unless the controversy as to the extent of the prohibition of Canon 782, § 5, is authoritatively determined, a child of the Latin Rite confirmed by a priest of an Oriental rite in virtue of a general faculty, should not be confirmed again even conditionally.

HIGH MASS OR LOW MASS?

I noticed in a periodical some months ago the solution of a case in which stipends were left in a will without specification as to whether high Masses or low Masses were to be celebrated. The solution adverted to the fact that the problem had been discussed by four canonists in this country, that opinion was equally divided, and that as a consequence half the fund should be devoted to high Masses and half to low Masses. I have been of the opinion that only the Ordinary could determine what was the testator's intention. Am I wrong?

CANCELLARIUS.

[8] *Commentarium Textus Iuris Canonici,* 6 vols. (Romae, 1921-1927), III, pars 1, n. 76.

[9] Cf. Cappello, *op. cit.,* I, n. 206; Vermeersch-Creusen, *Epitome Iuris Canonici* (3 vols., Vol. II, 5. ed., Mechliniae Romae, H. Dessain, 1934), II, n. 62.

[10] "Non expedire ut confirmati de quibus in casu, iterum ab Episcopo ungantur, nisi ad tonsuram et ordines promovendi sint, vel ipsi aut eorum parentes id petant... quibus in casibus Confirmationis sacramentum secreto conferatur et sub conditione."—*in Jerosolym.,* 14 ian. 1885—*Coll. S. C. P. F.,* n. 1630.

[11] "Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent..." —Canon 15.

A fundamental distinction is to be observed between the effort to interpret a law and the attempt to interpret the mind of a private testator. In the matter of bequests to pious causes, canon law is explicit in affirming unequivocally that the mind of the testator is the supreme law and that the Ordinary is the executor,[1] that is, the trustee primarily and exclusively (under the Holy See, of course) charged with fulfilling the mind of the testator. When there is a doubt as the intention of the latter, it obviously can be resolved by no one less in authority than the Ordinary.

If the doubt concerned a law and there was probability on the side of both opinions, either could be followed. There would be no necessity of following both proportionately. The proportionate discharge of an obligation enters the case, according to the doctrine of moralists, when there is no doubt about the existence of the obligation raised by a private contract, but rather about its extent or fulfillment. In the case of unspecified Mass intentions in a will, the doubt raised by the divergent views of the authors, touches the extent of the obligation. The obligation in doubt is not one raised by the law but by a private contract. Clearly judicial interpretation is required to discern the disputed meaning of private contracts. For the forum of conscience, this could be based on private reasoning, in the absence of positive law to the contrary. But in the case of bequests to pious causes, canon law reserves the judicial decision to the Ordinary. By reservation, it may be withdrawn even from his judgment.

Now extrinsic authority is not of too great value in interpreting the meaning of a private act. In the case of a law, if a set of great names is opposed to another set of great names as to its meaning, one may safely follow either. But it is quite another matter for a set of great names to say that testators always mean high Masses when they do not specify the kind. The most that the great names can do is to instruct the judicial mind by saying that there exists a presumption of fact which should stand until overthrown by direct or circumstantial evidence to the contrary. They can

[1] Canon 1515, § 1. "Ordinarii omnium piarum voluntatum tam mortis causa quam inter vivos exsecutores sunt." § 2. "Hoc ex iure Ordinarii vigilare possunt, ac debent, etiam per visitationem, ut piae voluntates impleantur, et alii exsecutores delegati debent, perfuncti munere, illis reddere rationem." § 3. "Clausulae huic Ordinariorum iuri contrariae, ultimis voluntatibus adiectae, tanquam non appositae habeantur."

lay down a law of evidence or of proof; but they can not interpret a thousand acts with the same authority as they can interpret the one act known as a positive enactment of law. Extrinsic probability then would seem to be a basis not for porportionate adjustment of a contractual obligation, but only for fulfilling it wholly in one way and not in another, or not at all. The authors raise a general presumption of fact, which amounts to a doctrinal presumption of law. The doubt concerns the presumption to be used, and is to this extent a doubt of law. But in accepting extrinsic authority, either presumption should be used without proportionate adjustment. One could be inconsistent and apply one presumption to half the fund and the other presumption to the other half. But he would not be bound to do so. And in any event, it is the Ordinary who should make the application unless the matter has been withdrawn from his control.

One doubts whether the extrinsic authority as to either presumption in the present matter is sufficient to justify reliance on it alone. The Ordinary, of course, would be benefited by instructing his mind on their views in order to inform himself of the intrinsic authority upon which he could frame his decision.

Now what is the intrinsic authority on each side of this question? Keller, relying on Woywod's view, argues that the celebrant always has a right to the stipend for a high Mass because this is the manner in which the Church would have him celebrate.[2] The presumption is, therefore, that the testator desired to conform to the will of the Church. The *Ecclesiastical Review* adopting this view in 1931 stated, in a case not wholly in point, that where two thousand dollars were left for Masses in a church in which only one Mass a day was celebrated, it could be presumed that the testator wished them to be celebrated over a period of many years as low Masses.[3] This solution was criticized in the *Review* by a bishop who had doubled the stipend in distributing two hundred Mass intentions under the will of a priest who had customarily celebrated high Masses in his lifetime. On referring the matter to the Sacred Con-

[2] Keller, *Mass Stipends,* n. 27, The Catholic University of America Canon Law Studies (Washington, D. C., 1925), pp. 85, 86; Woywod, *The Homiletic and Pastoral Review,* XXI (1921), 812.

[3] LXXXIV (1931), 521.

gregation of the Council, he was instructed to have as many Masses celebrated as there were ordinary stipends remaining.[4] The *Review* replied that the action of the bishop was not in point, was rather in contravention of Canon 830.[5] But in 1917, the *Review* had said that the decision depends on the presumed intention of the testator,[6] and in 1900 it had argued that *ex communiter contingentibus* low Masses are to be said.[7]

The present writer argues that the presumption stands in favor of low Masses. From a liturgical point of view, the Church may be said to prefer the high Mass. That is no argument that she prefers it juridically. Nowhere in the course of the Church's present legislation, or, it would seem, in the legislation of the Church at any time, has a high Mas been commanded, except in the case of the conventual Mass. There the further obligation is based upon not only the liturgy but the possession of the benefice, a juridical office supporting a juridical obligation. It would seem unwarranted to build a general juridical presumption on a liturgical preference.

On the other hand, several arguments support the opposite presumption. When the income from endowments is diminished so that the numbers of Masses must be reduced, authors counsel that the obligations of high Masses are to be eliminated first, in order that a greater number of Masses may remain to be celebrated as low Masses. They seem to think that the testator would wish to have the high Masses omitted in order that he may benefit by the greater number of low Masses.[8]

The motive of testators, a motive which they receive from their accredited teachers, is to aid their souls by the propitiatory power of the Holy Sacrifice; it is not benevolence to a church or a priest, for this benevolence can be manifested by outright gifts.

[4] LXXXV (1931), 525.

[5] Canon 830. "Si quis pecuniae summam obtulerit pro Missarum applicatione, non indicans earundem numerum, hic supputetur secundum eleemosynam loci in quo ablator morabatur, nisi aliam fuisse eius intentionem legitime praesumi debet."

[6] LVI (1917), 302.

[7] XXII (1900), 536.

[8] Cf. D'Annibale, *Summula Theologiae Moralis* (3. ed., 3 vols., Romae, 1891), III, 76; Many, *Praelectiones de Missa* (Parisiis, 1903), p. 80.

Several cases resolved in the *Ecclesiastical Review,* while not precisely to the point, afford parallel argument. One argued that the Masses were obligatory even though the testator had previously promised to remember the identical priest in his will, and there was no other legacy to the latter.[9] A second would not allow a stipend equivalent to that which the testator always offered in his lifetime.[10] A third would not allow a stipend equivalent to that given to the identical priest beneficiary each Christmas time.[11]

The writer has only recently come into possession of a private reply made to an Ordinary in the United States in 1928. Though a private reply, it is valuable as indicating the mind of the Sacred Congregation of the Council. It shows itself as opposed to the presumption for high Masses. Implicitly, it favors the opposite presumption. The latter has thus received official endorsement and the Ordinary may safely follow it. If he feels that it is rebutted by direct or circumstantial evidence, he should, as directed in this particular response, refer the matter to the judgment of the Sacred Congregation. The text of the response is appended herewith.

Private

I. Utrum in testamentorum interpretatione, in quibus pecuniae summa pro Missarum celebratione relicta est, nihil autem in testamento dicto de Missarum natura, beneficiariis liceat mentem testatoris in Missarum cantatarum favorem interpretare necne:

II. Utrum quando testator pecuniae summam pro Missarum celebratione reliquit, nihil autem in testamento de Missarum numero dicto, beneficiario liceat summam duorum dollariorum pro singulis Missis lectis ex haereditate sumere necne;

S. Congregatio, omnibus mature perpensis, respondit: Ad utrumque NEGATIVE; nisi peculiares circumstantiae contrarium suadere videantur; quo in casu recurrendum erit, pro opportune interpretatione mentis testatoris, ad hanc Sacram Congregationem.

Romae, die 15 Iunii, 1928

[9] LI (1914), 736.

[10] XXVII (1902), 201.

[11] LXIII (1920), 294.

EX-SEMINARIAN AND NOVICE

I was admitted as a novice in an exempt clerical community on October 24, 1941. Though I had been a student in two different seminaries prior to that, my superiors have admitted me without consulting the Sacred Congregation of Religious, as I understand is required by a recent decree. Is my information correct?

NOVICE.

The decree was issued July 25, 1941, by the Sacred Congregation of Religious and the Sacred Congregation of Studies and Universities.[1] As is evident, three months from the date of the decree had not elapsed, much less three months from its promulgation in the *Acta Apostolicae Sedis* at the time when the novice was admitted. Therefore, the admission was governed by Canon 544, § 3,[2] that is with testimonial letters from the superiors of both seminaries, with the necessary consultation of the local Ordinary in each instance.

Now that the decree is of binding force, the admission of this novice would require the intervention of the Sacred Congregation of Religious. If he had been in two seminaries, surely he had left one. And under the recent decree, the cause of his leaving is immaterial, that is, whether he was dismissed or left voluntarily. The new decree further does not distinguish between major and minor seminary and in this it agrees with Canon 544, § 3. It would seem not to be relevant therefore whether the seminary which the novice left was a minor seminary or not. The one case which seems to be excluded is that in which the seminarian was transferred by the authority of his local Ordinary. In this case, one seems not to be dismissed or even to "leave" the seminary. A moral continuity is preserved and he should juridically be regarded as persevering in one seminary.

Ellis would apply the latter argument to one who, after having made arrangements for entrance into the religious community, leaves the seminary for the first time when he is admitted into the community.[3] If the sweeping language of the decree is to be given

[1] Cf. *AAS*, XXXIII (1941), 371; THE JURIST, II (1942), 61.

[2] Canon 544, § 3. "Si agatur de admittendis illis qui in Seminario, collegio vel alius religionis postulatu aut novitiatu fuerunt, requiruntur praeterea litterae testimoniales, datae pro diversis casibus a rectore Seminarii vel collegii, audito Ordinario loci, aut a maiore religionis Superioris."

[3] Cf. *Review for Religious*, I (1942), 71.

unqualified application, even in this case, the continuity of seminary residence would seem to be broken. It is not the same case as that in which the transfer is protected by the authority of one's bishop. He is abandoning his bishop; indeed, he is abandoning the mode of life for which the seminary was a preparation. Arguing from the intent of the law, the prevention of this would seem to be included, as well as the exclusion of unworthy candidates. This is clear as to the admission to the seminary of ex-religious, which the decree also regulates, for in that case, the mere fact that a student was in any way dedicated to a religious community prevents his admission into the seminary without the intervention of the Sacred Congregation of Studies and Universities. Previously, under Canon 1363, § 3, only those dismissed from a religious community were affected, and of course only to the extent of a proper investigation by the local Ordinary.[4] Thus the present decree is more sweeping than the law of the Code as to the persons included when the question is raised of admission to a seminary. Why should it not be considered at least as extensive as Canon 544, § 3, as to the persons involved, when the question is raised of admission to a religious community? Now Canon 544, § 3, embraces all who were ever in a seminary, major or minor. Why, then, should a distinction be made in the present decree between those who leave prior to admission to a religious community and those who leave contemporaneously with admission to a religious community? Canon 544, § 3, indeed, requires only testimonials of the seminary authorities issued after consultation with the local Ordinary, and may therefore be said to contemplate primarily the exclusion of unworthy candidates. But this seems to supply an *argumentum ad hominem;* that is, even if the present decree aims merely at the exclusion of unworthy candidates, it should apply to all those who were ever in a seminary, major or minor.

The present decree does not affect apparently those who transfer from one religious community to another; if this is done prior to profession, these persons would still be governed by Canon 544, § 3; if after profession, by Canon 542, 1°. It omits mention also of

[4] Canon 1363, § 3. "Dimissi ex aliis Seminariis vel ex aliqua religione ne admittantur, nisi prius Episcopus etiam secreto a Superioribus aliisve notitias requisierit de causa dimissionis, ac de moribus, indole et ingenio dimissorum, et certo compererit nihil in eis esse quod sacerdotali statui minus conveniat; quas notitias, veritati conformes, eorum conscientia graviter onerata, suppeditare Superiores debent."

those transferring from one seminary to another; the latter, therefore are governed by Canon 1363, § 3, if the transfer occurs following a dismissal from one seminary. But in the United States, the law of the II and III Plenary Councils is more exacting, requiring that those who thus transfer, whether after dismissal, or from inconstancy, or to escape the rigors of a given seminary, must bring with them letters from the bishop *and* the superiors of the seminary which he had just left. This provision is *praeter Codicem* and is consequently still in force.[5]

MANUAL BENEFICES EXEMPT BY LAW FROM RESERVATION

An historical investigation of the subject of benefices reveals the fact that there were many classes of benefices which were not affected by the reservations. The same condition is verified today as the Code exempts several types of benefices from reservation, including manual benefices.[1]

The precise determination of the nature of a manual benefice, however, presents some difficulty. Most pre-Code canonists described the manual benefices as those *amovibilia ad nutum*.[2] Sometimes, though less frequently, they were simply termed *revocabilia*. This term was always understood as meaning revocable *ad nutum*.[3] The Code has adopted this latter terminology and defines the manual benefice as one which has been conferred

[5] II Plenary Council of Baltimore, n. 180. "Experientia docet saepius evenire, ut alumni unius Seminarii in aliud migrent, sive quia ad ministerium haud idonei judicantur, sive disciplinae severioris fuga, sive tandem ex animi inconstantia et levitate. Praecipimus igitur, ut nemo hujusmodi in posterum in Seminarium quodvis admittatur, nisi secum afferat literas testimoniales ab Episcopo et Superioribus Seminarii, ex quo recens egressus est. Quod si eum hactenus Episcopus ille aut superiores Seminarii suis sumptibus aluerint, ex justitia recuperare debent ab Episcopo aut Superioribus Seminarii, ad quod transiit, tantum, quantum in ipso educando impensum fuit." Repeated verbatim by quotation in III Plenary Council of Baltimore, n. 176.

[1] "At nunquam sunt reservata, nisi id expresse dicatur, beneficia manualia aut iuris patronatus laicalis vel mixti."—Canon 1435, § 2.

[2] Riganti, In regul. I, sectio I, n. 316; Lotterius, *De re beneficiaria*, lib. I, q. VII, n. 20; Scavini, *Theologia moralis universalis*, III, 523.

[3] Reiffenstuel, *Ius canonicum universum*, lib. III, tit. V, n. 42.

revocably.[4] Consequently, this definition must be accepted according to its former usage, i. e., as indicative of a benefice which is revocable *ad nutum.*

Just what is meant when it is stated that a manual benefice is one which is revocable *ad nutum?* In its etymological sense such a phrase would denote a benefice from which the incumbent could be removed at the will or pleasure of another. It would signify a removal which could be completely arbitrary on the part of the one removing. No cause would be required, no process would be necessary. But may one reasonably conclude that this literal meaning of the phrase *amovibilia ad nutum* determines which benefices are manual? Despite the opinion of many of the earlier canonists, e. g., of Gonzalez, Garcia, Reiffenstuel, and Schmalzgrueber,[5] as Cappello notes,[6] most of the pre-Code canonists would have answered this question in the negative, because there were manual benefices in France and Belgium whose incumbents (commonly called *desservants* or *succursales*) could be validly removed only where a *just cause* was present. This opinion, which demanded the existence of a just cause for the removal of a cleric from such manual benefices, was supported as the legally accepted doctrine in many documents of the Roman Curia.[7]

Furthermore the phrase *amovibilia ad nutum* insofar as it modified the manual benefice was subject to an even more rigid interpretation. Thus under the pre-Code laws there were circumstances in which the holders of manual benefices could be removed only by means of a canonical process (not necessarily judicial). Take the situation here in the United States. Granted that at that time our missions were not benefices. Yet they were ecclesiastical offices and their rectors were in most cases removable at

[4] Canon 1411, n. 4: "(beneficia ecclesiastica dicuntur) Manualia, temporaria seu amovibilia, vel perpetua seu inamovibilia, prout conferuntur *revocabiliter* vel in perpetuum."

[5] Bouix (*De parocho,* pp. 403-425) presents a detailed treatment of this entire discussion.

[6] *De administrativa amotione parochorum seu commentarium in decretum "Maxima cura"* (Romae, 1911), p. 118, footnote 2.

[7] Pierantonelli (*Praxis fori ecclesiastici* [Romae, 1883], pp. 95, 96 and 110) lists many such documents.

the will of the local Ordinary.[8] Thus they offer an opportunity to study the meaning of the phrase *amovibilia ad nutum.* In 1887 the Sacred Congregation for the Propagation of the Faith ruled that the penal removal of any of our removable rectors could be validly accomplished only by means of a canonical process.[9]

Closer to the question at hand was the similar problem which concerned the *desservants* in France. Due to conditions in that country the Church permitted the existence of many parishes whose pastors (called *desservants*) were removable at the will of the bishop.[10] Now after the promulgation of the decree *Maxima cura* by the Sacred Congregation of the Consistory on August 20, 1910,[11] these rectors could be removed from their benefices only through the administrative removal process outlined in this decree.[12] Yet these benefices were and still are considered manual benefices (*amovibilia ad nutum*) whose incumbents could be removed only through an administrative process of law. This, of course, shows that the expression *amovibilia ad nutum* was under-

[8] Golden, *Parochial benefices in the new Code*, n. 10. The Catholic University of America Canon Law Studies (Washington, 1921), pp. 99, 100.

[9] *Collectanea Sacrae Congregationis de Propaganda Fide* (2 vols., Romae, 1907), n. 1669. Cf. also *Fontes* (vol. VII), n. 4917. The Congregation was asked whether a canonical process was necessary for the validity of the act whereby the bishop transferred or removed a missionary rector (amovibilis) from his office of pastor. The answer was "In casibus remotionis peragendae in poenam criminis vel reatus disciplinaris, affirmative; in reliquis, negative; sed opus est ut fiant graves ob causas, et habita meritorum ratione iuxta dispositionem Concilii Plenarii Baltimoren. Tit. II, c. 5, § 32; . . ."

[10] *Thesaurus resolutionum Sacrae Congregationis Concilii* (167 vols., Romae, 1718-1908), CXXXIX (1880), 666; Bouix, *De parocho*, p. 418; Santi, *Praelectiones iuris canonici*, III, 269.

[11] *Fontes*, n. 2074.

[12] Cf. Cappello, *De administrativa remotione parochorum*, p. 119, where he comments on canon 30 of this decree.

benefices.[13] Thus it is clearly evident that there were manual

[13] De Meester, *Iuris canonici et iuris canonico-civilis compendium*, n. 1395; Vermeersch-Creusen, *Epitome iuris canonici*, I, 390; Fanfani, *De iure parochorum*, p. 6, footnote 1.

stood in a much more rigid sense than its literal meaning would have implied.

The most practical norm to determine whether a given benefice is manual or perpetual is, quite naturally, to examine the decree whereby the benefice was erected. Under ordinary circumstances this will specifically state whether it is a perpetual (irremovable) benefice or a manual (removable) benefice. If the decree has been lost or if it does not mention this matter, the *customary* manner in which it has been conferred will evidence the nature of the benefice.[14] Finally, if custom does not demonstrate the nature of the benefice, the determining factor will be the presumption that all secular benefices are perpetual and all religious benefices manual.[15]

It is opportune at this point to pay particular attention to the consideration of parochial benefices. Under the pre-Code law one of the primary divisions among parochial benefices was that of the *paroeciae amovibiles* and the *paroeciae inamovibiles*. The former were always considered manual benefices.[16] The Code repeats this division in canon 454, § 2.[17] Therefore this present division should be interpreted just as it was before the Code.[18] Consequently the present-day removable pastors possess manual benefices. Confirming this opinion is the fact that the Code has used the two terms *parochus amovibilis* and *clericus obtinens beneficium inamovibile* in contradistinction to each other.[19] Now

[14] Schmalzgrueber, *Ius ecclesiasticum universum*, lib. III, tit. V, n. 36.

[15] Reiffenstuel, *Ius canonicum universum*, lib. III, tit. V, n. 46.

[16] Bouix, *De parocho*, pp. 208, 226, 350; Pierantonelli, *Praxis fori ecclesiastici*, p. 87; Grandclaude, *Ius canonicum iuxta ordinem decretalium* (3 vols., Parisiis, 1882), II, 406; Ballerini-Palmieri, *Opus theologicum morale*, IV, 361.

[17] "At non omnes parochi eandem obtinent stabilitatem; qui maiore gaudent, inamovibiles; qui minore, amovibiles appellari solent."

[18] Cf. canon 6, n. 2.

[19] Canon 2180: "*Parochum amovibilem* inobedientem Ordinarius statim ad normam can. 2177 coercere potest; *si vero agatur de clerico qui, beneficium inamovibile obtinens*, non paret, sed novas allegat deductiones, Ordinarius eas ad examen revocet ad normam can. 2178." Cf. also cc. 2173 and 2174.

if the Code considered the removable pastor as possessing a perpetual benefice, such a contrast would be meaningless.

Both Golden [20] and Coady [21] oppose this view. They readily admit that the religious removable pastors hold manual benefices but deny that the secular priests who are removable pastors possess manual benefices. The thought which has influenced their stand in this question is the fact that these secular removable pastors can be removed only through the administrative process outlined in the Fourth Book of the Code. From this they conclude that they are not removable *ad nutum* and hence do not hold manual benefices. Their fault lies in this that they interpret the phrase *amovibilia ad nutum* in its literal sense.

Opposed to Golden and Coady are many authors who maintain that all removable pastors possess manual benefices. Most emphatic in this stand are Vermeersch-Creusen,[22] Beste,[23] and Woywood.[24] Many others join these authors by implicitly stating this same doctrine. Thus Cocchi states that removable pastors do not possess subjective perpetuity in their benefices.[25] This is but another way of holding that they are manual benefices because those pre-Code authors who denied that manual benefices were real benefices did so because they lacked subjective perpetuity. Again Bouuaert-Simenon in commenting on canon 1576 (which rules that a collegiate tribunal of three judges must be used for the penal removal of a cleric from an irremovable benefice) remark that a collegiate tribunal would not be required to

[20] *Parochial benefices in the new Code*, p. 14.

[21] *The appointment of pastors*, n. 52, The Catholic University of America Canon Law Studies (Washington, 1929), pp. 90, 94.

[22] *Epitome iuris canonici*, III, n. 357: "Parochi amovibiles sunt ii quorum beneficium ea condicione est constitutum vel collatum, ut *ad nutum Ordinarii amoveri possint*."

[23] *Introductio in Codicem*, p. 708: "Manualia beneficia appellantur beneficia quae revocabiliter conferuntur. Quamobrem provisio paroeciarum amovibilium nunquam reservatur." Cf. p. 698 also.

[24] "The conferring of benefices"—*Homiletic and Pastoral Review*, XXIX (1929), 272-280. On p. 275 he states: "Manual benefices are those which are conferred revocably, e. g. most parishes in the United States."

[25] *Commentarium in Codicem iuris canonici*, III, 189, n. 81.

deprive a removable pastor of his benefice.[26] Obviously they could not make such a statement unless they believed that the *paroecia amovibilis* is a manual benefice and not perpetual. Wernz-Vidal likewise infer that the removable parish is but a manual benefice. Thus they state that the removable pastor does not possess a perpetual title to his benefice.[27] Then in another section of their work they maintain that the manual benefice differs from the perpetual insofar as it is not conferred *in titulum perpetuum*.[28]

In the presence of such proofs it is only logical to conclude that despite the opinion of Golden and Coady the parochial benefices held by removable pastors are manual benefices and thus are not affected by the reservations contained in the Code. Thus if the Holy See promotes a removable pastor to an episcopal see, his parochial benefice will not be reserved even though it is specifically stated in the decree of his appointment that any and all benefices he holds are reserved. The only time his removable parish would be reserved would be where the Holy See states in the decree of appointment that it is reserving any manual benefices he might possess.

JOHN J. HAYDT

PHILADELPHIA, PA.

[26] *Manuale iuris canonici*, p. 288, n. 564.

[27] *Ius canonicum*, VI, 728.

[28] *Ius canonicum*, II, 169, n. 142.

Decrees and Decisions

CANONICAL

SACRA CONGREGATIO PRO NEGOTIIS ECCLESIASTICIS EXTRAORDINARIIS

INDULTUM [1]

[De Lege Abstinentiae et Ieiunii]

Attentis peculiaribus hodiernis rerum adiunctis, Ssmus Dominus Noster Pius Divina Providentia PP. XII omnibus Ordinariis locorum, cuiuslibet ritus, quamdiu praesens bellum perdurabit, benigne concedere dignatus est, ut, pro suo prudenti arbitrio, in territorio suae iurisdictionis, indulgeant generalem dispensationem super lege abstinentiae et ieiunii ecclesiastici, in favorem etiam religiosorum et religiosarum exemptionis privilegio utentium.

Firma tamen maneat lex abstinentiae et ecclesiastici ieiunii, pro fidelibus ritus latini, Feria IV Cinerum et Feria VI in Parasceve, pro fidelibus vero alius ritus duobus diebus ab eorum Ordinariis statuendis.

Ordinarii autem locorum, qui supradictam dispensationem concedunt, fideles omnes hortentur, praesertim vero Clerum saecularem ac regularem necnon sacrarum Virginum familias, ut ii christianae mortificationis et expiationis voluntariis exercitiis, bonis operibus potissimum erga aegros ac inopes vacantes, et ad mentem Summi Pontificis fervidas Deo preces fundentes, aliquo modo indulto facilitates compensare valeant.

Contrariis quibuslibet non obstantibus.

Ex Aedibus Vaticanis, die 19 mensis Decembris a. 1941.

A. Card. Maglione, *a Secretis Status,*
S. Congr. pro Negotiis Ecclesiasticis Extraordinariis
Praefectus.

[1] *AAS*, XXXIII (1941), 516; cf. The Jurist, II (1942), 180.

SUPREMA SACRA CONGREGATIO S. OFFICII

DECRETUM [1]

[Re: Cautiones]

Quaesitum est ab hac Suprema S. Congregatione:

1° utrum cautiones quae ad normam can. 1061 praestari debent de universa prole catholice tantum baptizanda et educanda comprehendant solummodo prolem nascituram, an etiam prolem ante matrimonii celebrationem forte iam natam;

2° quid sentiendum de matrimoniis celebratis cum cautionibus de prole nascitura, neglecta prole forte iam nata.

Emi ac Revmi Patres, rebus fidei ac morum tutandis praepositi, in consesso plenario feriae IV diei 10 Decembris 1941, praefatis dubiis responderunt:

ad 1um: *Affirmative* ad primam partem; *Negative* ad secundam;

ad 2um: Provisum in primo.

Et ad mentem: mens autem haec est: quamvis per se, ad normam praefati canonis, cautiones non exigantur de prole forte iam nata ante matrimonii celebrationem, omnino monendos esse nupturientes de gravi obligatione iuris divini curandi catholicam educationem etiam dictae prolis forte iam natae.

Et feria V, die 15 Ianuarii 1942, Ssmus D.N. Pius, Divina Providentia Papa XII, in solita audientia Excmo ac Revmo Domino Adsessori S. Officii impertita, relatam Sibi Emorum Patrum resolutionem adprobavit, confirmavit et publicari iussit.

Datum Romae, die 16 Ianuarii 1942.

I. Pepe, *Supr. S. Congr. S. Officii Notarius.*

[1] *AAS*, XXXIV (1942), 22; cf. The Jurist, II (1942), 185.

E. J. Mahoney in *The Clergy Review* (XXII [1942], 283), says *cautiones* were held to apply to *proles natus* by Gasparri (1932), I, n. 451; De Becker, *De Matrimonio* (1931), p. 94; Gougnard, *De Matrimonio* (1937), p. 425; Prümmer, *Theologia Moralis* (1933), III, n. 788; and *ER* [XC] (1934), 534. Thinks that now even a refusal as to *proles natus* would not interfere with granting the dispensation.

PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS

RESPONSA AD PROPOSITA DUBIA [1]

EMI PATRES PONTIFICIAE COMMISSIONIS AD CODICIS CANONES AUTHENTICE INTERPRETANDOS PROPOSITIS IN PLENARIO COETU QUAE SEQUUNTUR DUBIIS, RESPONDERI MANDARUNT UT INFRA AD SINGULA:

I—DE VICARIO COOPERATORE QUOAD MATRIMONIA.

D. An vicarius cooperator ratione officii, de quo in canone 476 § 6, matrimoniis valide assistere possit.

R. Negative.[2]

II—DE IURE FUNERANDI MONIALES.

D. Utrum parocho an cappellano, ad normam canonis 1230 § 5, competat ius funerandi moniales ab Ordinarii loci iurisdictione non exemptas iuxta canonem 615.

R. Negative ad primam partem, affirmative ad secundam.

III—DE TRANSMISSIONE ACTORUM CAUSAE.

D. An sub verbis *acta causae*, de quibus in canone 1890, veniant omnia acta iudicialia.

R. Affirmative.

Datum Romae, e Civitate Vaticana, die 31 mensis Ianuarii, anno 1942.

M. CARD. MASSIMI, *Praeses.*

L. * S. I. BRUNO, *Secretarius.*

[1] *AAS*, XXXIV (1942), 50.

[2] In *The Clergy Review* (XXII [1942], 285), E. J. Mahoney says PCI settled power of subdelegation of vicar cooperator and took for granted his delegation 20 May and 13 Dec. 1923, V, ad 6, amplified in 28 Dec. 1927. Before 1934 certain writers in *Jus Pontificium* said *de iure* from Can. 476, § 6; others in *Apollinaris* denied this. *Apollinaris* [VII] (1934), 77, and other journals of that year published a reply of Gasparri, President PCI, denying it. Thereafter common error was invoked. Opportune therefore to publish reply of eight years ago. [Cf. *AAS*, XVI (1924), 114; XX (1928), 61].

LITTERAE APOSTOLICAE [1]

SANCTUS ALBERTUS MAGNUS, EPISCOPUS CONFESSOR ATQUE ECCLESIAE DOCTOR, CULTORUM SCIENTIARUM NATURALIUM COELESTIS PATRONUS DECLARATUR.

PIUS PP. XII

Ad perpetuam rei memoriam.—Ad Deum per rerum naturae cognitionem Sanctus Albertus Magnus Episcopus Confessor atque Ecclesiae Doctor *ad laudem Dei Omnipotentis, qui fons est sapientiae et naturae sator et rector* (*Physica,* l. I, tr. 1, c. 1) ascendere conatus, omnes sui temporis scientias sive quod ad sacra sive quod ad profana spectantes percipere contendit in eisdemque ita mirabiliter versatus est ut *stupor mundi* ac *doctor universalis* ab ipsismet aetatis suae scriptoribus tanta doctrina attonitis nuncupari meruerit. . . . Nil mirum itaque si non modo ex Italia, sed tam e Germania, et Gallia et Hungaria, quam e Belgio atque Hollandia, nec non ex Hispanis et America, Insulisque etiam Philippinis Studiorum Universitates et Conlegia Catholica praecipua una cum multis physicarum naturaliumque rerum professoribus nunc Albertum Magnum tanquam lucernam in caliginoso mundo contueantur, Illumque, qui iam tempore suo, quo multi oculos suos a spiritualibus rebus avertebant inani verborum scientia inflati, a terrenis e contra ad coelestia gradatim ascendendum esse exemplo docuit, suorum ipsorum ducem habere et coelestem intercessorem exoptent, ne in sua exacta naturae perscrutandae scientia Dei Omnipotentis auxilium eis desit. . . . Conlatis igitur de hac re consiliis cum Venerabili Fratre Nostro Episcopo Praenestino, Sacrae Rituum Congregationis Praefecto, . . . praesentium Litterarum tenore deque Apostolicae Nostrae potestatis plenitudine, perpetuumque in modum Sanctum Albertum Magnum Episcopum Confessorem et Ecclesiae Doctorem Cultorum Scientiarum naturalium coelestem apud Deum *Patronum* declaramus et constituimus, privilegiis honoribusque additis, quae huismodi coelestis patronatus propria sunt. . . .

Datum Romae, apud Sanctum Petrum, sub anulo Piscatoris, die XVI m. Decembris MCMXXXXI, Pontificatus Nostri tertio.

A. CARD. MAGLIONE, *a Secretis Status.*

[1] *AAS,* XXXIV (1942), 89.

SACRA CONGREGATIO RITUUM

[Re: Commune Unius aut Plurium Pontificum]

URBIS ET ORBIS [1]

Sancta Mater Ecclesia Summos Romanos Pontifices peculiari semper prosequuta est honore, qui, dum Apostolicae Cathedrae iura strenue defenderunt, atque evangelicam veritatem totum per orbem diffuderunt, vitae quoque sanctitudine ac pretiosa morte fidelibus commissi sibi gregis facti sunt exemplar. Quod si inferorum portae omni tempore apostolicae petrae soliditatem vanis quidem, sed diuturnis saevis ac saepe cruentis tentaminibus aggressae sunt; hodiernis temporibus, negata quavis super naturalium rerum oeconomia, Ecclesiae hostes directe et ipsos Supremos Pastores livore suo impetere, pravisque dicteriis maculare impie conantur. Ut itaque his lacrimabilibus obvietur excessibus, atque Summorum Pontificum dignitas, eis divinitus collata, magis magisque honestetur, simulque ii inter ipsos, qui sanctitate fulserunt maiori veneratione coluntur, Sanctissimus Dominus Noster, Dominus Pius Papa XII novum Commune in festo Sanctorum Summorum Pontificum conficiendum esse decrevit. Cum autem infrascriptus Cardinalis Carolus Salotti, Episcopus Praenestinus, S.R.C. Praefectus, in audientia diei 9 Ianuarii, confectum schema una cum lectionibus tertii nocturni, legendis in festo Summorum Pontificum, et additionibus et variationibus sive in missali sive in breviario romano ex hac nova concessione occurrentibus, Sanctissimo Domino obtulerit, Sanctitas Sua benigne illud approbavit et adhibendum mandavit in festo sive unius sive plurium Summorum Pontificum tam martyrum quam confessorum, qui propria missa in missali romano non gaudent. Contrariis quibuscumque, etiam speciali mentione dignis, non obstantibus.

Datum Romae, die 9 Ianuarii 1942.

C. Card. Salotti, Ep. Praenestinus, *Praefectus.*

A. Carinci, *Secretarius.*

[1] *AAS*, XXXIV (1942), 111.

SACRA CONGREGATIO RITUUM
URBIS ET ORBIS
DECRETUM [1]

De lampade Ssmi Sacramenti et de luminibus in sacris functionibus adhibendis.

Sacra Rituum Congregatio, quoties ei contigit cavere de lampade quae ante Ssm̃um Sacramentum indesinenter lucere debet, semper abstinuit a concedendo per generale indultum usu lucis electricae, iugiter insistens traditionali legi de usu cerae apum et olei olivarum et, non exclusis, in casu necessitatis, aliis oleis (Decret. N. 4334): idque ut nostrae fidei et caritatis symbolica significatio servetur et, iuxta indolem cultus, visibilis materiae destructio. Porro haec S. Rituum Congregatio summam decretorum circa usum lucis electricae praebuit Decreto N. 4322 diei 24 Iunii 1914. At biennio post, id belli europaei conditionibus exquirentibus, et instantiis plurimorum Ordinariorum morem gerens, per Decretum N. 4334 diei 23 Februarii 1916 indultum temporaneum concessit quo, pro lampade Ssm̃i Sacramenti, ultimo loco adhiberi posset etiam lux electrica.

Iamvero nunc, praesenti bello perdurante atque redeuntibus iisdem adiunctis, haec S. Congregatio, auctoritate Summi Pontificis, derogans praescripto canonis 1271 C.I.C. et *Ritualis Romani*, tit. IV, c. I, n. 6, necnon huius S. Congregationis Decretis, inhaerens vero Decreto N. 4334 diei 23 Februarii 1916, rursus remittit Ordinariorum prudentiae ut, peculiaribus huius belli circumstantiis sive ordinariis sive extraordinariis perdurantibus, ubicumque oleum olivarum vel cera apum vel penitus deficiant vel sine gravi incommodo et dispendio haberi nequeant, ibi lampas Ssm̃i Sacramenti aliis oleis, quantum fieri potest vegetabilibus, nutriri possit, ultimo autem loco etiam lux electrica adhibeatur.

Item Ordinariorum prudentiae remittit, ut, praesentis belli supradictis adiunctis perdurantibus, in defectu cerae apum, reducatur numerus candelarum pro singulis sacris functionibus rite praescriptus, et huic deficientiae cereorum sufficiantur usque ad numerum requisitum candelarum alia lumina, etiam electrica. Contrariis non obstantibus quibuscumque.

Die 13 Martii 1942.

✠ C. Card. Salotti, Ep. Praenestinus, *Praefectus.*

L. * S. A. Carinci, *Secretarius.*

[1] *AAS*, XXXIV (1942), 112.

SUPREMA SACRA CONGREGATIO S. OFFICII

DECRETUM [1]

[Re: Radiaesthesia]

Suprema S. Congregatio S. Officii, incommodis mature perpensis, quae in religionis veraeque pietatis detrimentum cedunt ex *Radiaesthesiae* consultationibus a clericis peractis circa personarum circumstantias et eventus divinandos, ac prae oculis habitis quae in can. 138 et 139 § 1 Codicis Iuris Canonici statuuntur ad clericos religiososque ab iis rebus arcendos quae ipsorum officium dignitatemque dedeceant aut eorum auctoritati nocere possint, haec quae sequuntur decernit, quin tamen quaestiones scientificas de Radiaesthesia hoc Decreto attingere velit:

Excellentissimis nempe locorum Ordinariis et Religiosorum Superioribus mandat, ut suis clericis et religiosis districta ratione prohibeant quominus ad illas Radiaesthesiae scrutationes unquam procedant, quae supradictas consultationes respiciant.

Eorumdem Ordinariorum vel Superiorum Religiosorum erit, si id necessarium vel opportunum duxerint, huiusmodi vetito poenalium sanctionum minas addere.

Quod si quis ex clericis et religiosis hoc vetitum transgrediens recidivus fiat, vel gravibus incommodis aut scandalo locum dederit, Ordinarii vel Superiores id deferant ad hoc S. Supremum Tribunal.

Datum Romae, ex Aedibus S. Officii, die 26 Martii 1942.

Ioannes Pepe, *Supremae S. Congr. S. Officii Notarius.*

SUPREMA SACRA CONGREGATIO S. OFFICII

DECRETUM [2]

De praevia censura librorum pietatis

Supremae huic Sacrae Congregationi Sancti Officii haud infrequenter parvi libri pietatis ac folia precum deferuntur quae, etsi ab erroribus sunt immunia quaedam tamen continent genuinae pietati christianae parum congruentia, et insueta cultus seu devotionis genera inducunt non conformia cum Decreto S. Officii, diei 26 Maii

[1] *AAS*, XXXIV (1942), 148; cf. The Jurist, II (1942), 307.

[2] *AAS*, XXXIV (1942), 149; cf. The Jurist, II (1942), 307.

1937, "De novis cultus seu devotionis formis non introducendis".

Ut igitur haec vitentur, Ordinarii ad praeviam librorum foliorumque pietatis censuram doctos et prudentes viros deputent, qui in suo obeundo munere nedum doctrinae puritati, sed et sacri cultus gravitati consulant; iidemque Ordinarii licentiam edendi huiusmodi scripta ne concedant nisi maxima adhibita cautela.

Datum Romae, ex Aedibus Sancti Officii, die 17 Aprilis 1942.

Ioannes Pepe, *Supr. S. Congr. S. Officii Notarius.*

SUPREMA SACRA CONGREGATIO S. OFFICII
DECRETUM [1]

De quibusdam cautelis adhibendis in causis matrimonialibus impotentiae et inconsummationis.

Qua singulari cura providendum sit et ab Ecclesia provisum fuerit ut in causis matrimonalibus impotentiae et inconsummationis necessitas assequendae iuridicae probationis, etiam quandoque per corporalem coniugum inspectionem, apte semper componatur cum naturali et christiano pudicitiae sensu, nulla unquam ratione obtundendo, immo, maxime in muliere, sancte fovendo, iam constat ex pluribus huius Supremae S. Congregationis documentis, inter quae meminisse sufficit duas Instructiones, alteram anno 1858 editam "Pro conficiendo processu super viri impotentia et non secuta matrimonii consummatione", alteram vero anno 1883 datam ad Episcopos rituum orientalium (art. 5, de impedimento impotentiae).

In prima ex his Instructionibus facile patere dicitur "quam sancte in omnibus huiusmodi inspectionibus cavendum sit, ne quidquam agatur quod divinae legi et castitatis virtuti adversetur"; haec autem continua Ecclesiae sollicitudo relata est in Codicem Iuris Canonici, qui cavet ut in causis impotentiae et inconsummationis matrimonii inspectio corporalis coniugum fiat "nisi ex adiunctis inutilis evidenter appareat" (can. 1976) atque "servatis plene christianae modestiae regulis" (can. 1979, 3).

Ut haec iuris praescripta adamussim serventur, Emi et Revmi Patres huius Supremae S. Congregationis, rebus fidei et morum tutandis praepositi, in plenario Conventu feriae IV, diei 3 Iunii 1942, opportunum duxerunt, quae sequuntur, vel quondam statuta in mentem Ordinariorum revocare, vel noviter praecipere.

[1] *Acta Apostolicae Sedis,* XXXIV (1942), 200.

1. Examen physicum coniugum, praesertim vero mulieris, utpote inutile, omittitur iuxta "*Regulas servandas* in processibus super matrimonio rato et non consummato" editas a S. C. de disciplina Sacramentorum, die 7 Maii 1923 (art. 86):

a) si consummatio haberi non potuit quia nec tempus nec locus nec modus adfuerunt matrimonii consummandi;
b) si iam constat de mulieris defloratione.

His casibus alii duo addendi sunt, nempe:

c) omitti poterit inspectio si, attenta partium et testium morali excellentia, ac serio pensatis eorum animi dispositionis necnon ceteris adminiculis aut argumentis, Ordinarii iudicio, plenissima iam habeatur probatio de impotentia vel de inconsummatione;
d) omittatur mulieris inspectio, si ex inspectione viri plene constiterit de huius incapacitate ad matrimonium consummandum.

2. Quoties ad necessariam probationem assequendam requiratur coniugum inspectio corporalis, ad inspiciendum virum deputentur periti medici, ad mulierem vero inspiciendam designentur (ad mentem can. 1979, 2) duae mulieres quae laurea doctorali in arte medica, vel saltem legitimo peritiae in arte obstetricia testimonio praeditae sint.

3. Si vero praefatae mulieres ad inspectionem perficiendam haberi nequeant, tunc licitum erit Ordinario, de consensu mulieris inspiciendae, examen peragendum committere viris, qui tamen non tantum medica arte sint insignes, sed etiam religionis et honestatis laude commendati, moribus atque aetate graves, ab ipso Ordinario vel iudice moniti de christianae modestiae regulis sancte servandis; quique ad inspectionem ne deveniant nisi adstante honesta matrona ex officio designanda (can. 1979, 3).

4. Si mulier aut inspectionem ipsam aut virorum operam recuset, abstinendum est ab urgenda inspectione vel ab exigendo virorum interventu; satis tunc erit illam monere de iuridicis suae recusationis consectariis, seu de graviori difficultate vel etiam de probabili impossibilitate assequendi sui propositi probationem.

5. Peracta per mulieres inspectione, earum orale examen fiat ab ipso Tribunali, semper tamen adstante medico in his rebus vere perito ac honestate claro, qui suas animadversiones et opportunas interrogationes proponere possit.

6. Excussio mulieris, quae est pars in causa, paratis ad normam iuris interrogationibus eidem proponendis, semper quidem fiat coram Tribunali, *sed a medico*, qui sit religione, moribus, aetate gravis, ab ipso Ordinario deligendus, omni exceptione maior.

7. In exarandis sententiis in huiusmodi processibus, praesertim si hae publici iuris fieri debeant, abstinendum erit a nimia et minuta rerum descriptione; facta vero et rationes exponantur castigatis verbis.

Quae omnia Ssmus D. N. Pius Pp. XII, in audientia diei 11 Iunii 1942, Sibi relata, adprobare dignatus est, ac publici iuris fieri et ab omnibus servari iussit, contrariis quibuslibet, etiam speciali mentione dignis, non obstantibus, ceterisque servatis de iure servandis.

Datum Romae, ex Aedibus S. Officii, die 12 Iunii 1942.

I. Pepe, *Supr. S. Congr. S. Officii Notarius.*

SACRA CONGREGATIO RITUUM

DECRETUM [1]

De Functionibus pro Defunctis

Quum plures locorum Ordinarii ab hac Sacra Rituum Congregatione exquisierint qualiter se gerere debeant quoad functiones funebres quae, praesertim hac tempestate, a defunctorum propinquis etiam diebus dominicis aut festis de praecepto celebrandae indiscriminatim petuntur; haec porro S. R. Congregatio eosdem vehementer hortatur, ut in huiusmodi functionibus peragendis curent ut omnino serventur praescriptiones quae tum in Rituali Romano (tit. VI, cap. I, n. 8 et cap. III, n. 18) cum in novis Missalis Rubricis (*Addit. et variat. in Rubr. Miss.*, tit. III, n. 4) continentur.

In exsequiis autem, si Missa celebratur, semper—nisi de pauperibus agatur—fiat in cantu, reprobata invalescente praxi eam legendi absque cantu etiam cum funus externam induit pompam. Quandocumque vero ex rationabili causa funebris functio ritu breviori aut simpliciori agi contingat, ea tamen gravitate ac pietate peragatur, quam non minus reverentia sacrorum quam populi aedificatio requirit.

[1] *Acta Apostolica Sedis*, XXXIV (1942), 205.

Quod vero ad Missae funebris qualitatem spectat, Missa exsequialis ea dicitur, iuxta novas rubricas (*Addit. et variat.*, l. c., n. 4), quae fit corpore defuncti physice aut saltem moraliter praesente. Corpus autem censetur praesens in altero ex immediate sequentibus duobus ab obitu diebus (S.R.C., decret. 3755, § 2); non autem ultra biduum ab obitu (S.R.C., decret. 3767, ad XXVI). Quoties autem praefata Missa a rubricis impeditur, transferri potest in proximiorem diem similiter non impeditum (*Addit. et variat.*, l. c., n. 4). Si vero Missa impediatur non a rubricis, sed ab alia causa, tunc dicitur opportuniori die post acceptum mortis nuntium (*Addit. et variat.*, l.c., n. 6); sed haec Missa, etsi privilegiata, non est tamen exsequialis, ideoque diebus dominicis aut de praecepto prohibetur. Hoc igitur in casu dicatur Missa dominicalis aut festiva diei; poterit tamen fieri absolutio ad tumulum, exceptis iis diebus dominicis et festis in quibus Missa exsequialis etim praesente cadavere prohibetur (*Addit. et variat.*, l.c., n. 4).

Hoc servandum praecipit S. R. Congregatio, sive agitur de militibus in locis dissitis bello peremptis, quorum mortis nuntius mature ad suos non pervenerit; sive agitur de definitiva alicuius corporis humatione, sive denique — eoque magis — de defunctorum anniversariis propriis vel fundatis, et de similibus casibus.

Datum Romae, die 1 Maii 1942.

✠ C. Card. Salotti, Ep. Praenestinus, *Praefectus.*

L. ✠ S. A. Carinci, *Secretarius.*

SACRA PAENITENTIARIA APOSTOLICA

(*Officium de Indulgentiis*)

DUBIUM [1]

De privilegio Sacerdotibus concesso in Motu Proprio "Summo solacio".

Sacrae Paenitentiariae Apostolicae dubium, quod sequitur, pro opportuna solutione, exhibitum fuit:

"Utrum privilegium personale, in Motu Proprio "Summo solacio", d.d. 12 mensis Maii vertentis anni, Sacerdotibus concessum,

[1] *Acta Apostolicae Sedis*, XXXIV (1942), 210. Cf. The Jurist, II (1942), 307.

intelligendum sit ad tramitem Declarationis S. Paenitentiariae Apostolicae d.d. 8 Martii 1929 (*Acta Apost. Sedis*, vol. XXI, pag. 168), ita ut Sacerdotes, sacrum litantes, in quolibet Missae Sacrificio, plenariam Indulgentiam lucrari et applicare possint, independenter a Missae applicatione, uni animae, in Purgatorio detentae, ab ipsis ad libitum designatae."

Et Sacra Paenitentiaria Apostolica proposito dubio respondendum censuit:

Affirmative

Facta autem de praemissis relatione Ssmo D. N. Pio div. Prov. Pp. XII ab infrascripto Cardinali Paenitentiario Maiori, in Audientia diei 8 mensis currentis, idem Ssmus Dominus responsum Sacrae Paenitentiariae benigne adprobavit, confirmavit et publici iuris fieri mandavit.

Datum Romae, e Sacra Paenitentiaria Apostolica, die 10 Iunii 1942.

N. Card. Canali, *Paenitentiarius Maior.*

L. * S. S. Luzio, *Regens.*

Marriage of Ab Acatholicis Nati with Orientals [1]

Utrum, firmo praescripto c. 1099, § 1, 1°, ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, forma canonica pro validitate matrimonii teneantur quoties cum fidelibus ritus orientalis contrahant, qui nulla forma adstringuntur ad validas nuptias ineundas.

Resp. *Negative.*

Holy Mass may be celebrated for the armed forces of the United States in the afternoon or evening under proper conditions, according to a special faculty granted by the Sacred Congregation of the Sacraments. The faculty is applicable only when attendance at morning Mass is not possible. A fast of four hours from food, of one hour from liquid, is prescribed for the celebrant and all who receive Communion. Alcoholic liquids are forbidden from the previous midnight. A similar faculty was enjoyed in World War I, but only for the benefit of troops in the field and only when their departure for the front or participation in an engagement prevented attendance at Mass in the morning.

[1] S. C. for the Oriental Church, to the Apostolic Delegate in the U. S. A., July 9, 1942.

The Sacred Penitentiary has granted to Most Rev. Francis J. Spellman, D.D., Archbishop of New York, and Military Vicar, the faculty for the erection of the Stations of the Cross even in military chapels devoted to non-Catholic as well as Catholic services, with power to subdelegate. A circular letter to chaplains indicates that this faculty will be subdelegated in particular cases.

* * * *

According to a notice sent to the clergy of his Archdiocese of Westminster by His Eminence, Arthur Cardinal Hinsley, the Holy See has given permission for the duration of the war that water only without wine may be used at the ablutions of the Holy Sacrifice.

Dataria Apostolica

INSTRUCTIO [1]

De observandis a Revmis Ordinariis quum ab Apostolica Dataria collationem petant beneficiorum non consistorialium, quae ad normam iuris Apostolicae Sedis sint reservata vel devoluta.

. . . . Revmi locorum Ordinarii suas monere Curias rogantur ut quoties a Summo Pontifice impetrare collationem beneficiorum Sanctae Sedi reservatorum aut devolutorum velint, ad Antistitem Maximum expressam petitionem mittant per litteras testimoniales *latine conscriptas et a Revmis Ordinariis subsignatas*: quae litterae, ut secure ad Pontificem Summum perveniant et sine mora expediantur, ad Emum Cardinalem S.R.E. Datarium (Palazzo della Dataria, Roma, via della Dataria, 94) mittendae erunt.

In huiusmodi litteris haec quae sequuntur contineri et patefieri debent:

1.—a) nomen et natura beneficii vacantis;

b) an illud sit *dignitas* (primi ordinis, an secundi vel tertii, etc.);

c) an sit simplex Canonicatus aut aliud beneficium chorale vel etiam non chorale, et quo nomine appelletur;

d) an curam animarum adnexam habeat; quonam sub titulo aut quonam Sancto Patrono vocetur; et utrum erectum existat in Urbe an alio in loco;

e) utrum beneficium sit liberae an necessariae collationis, idest an conferri debeat electione aut praesentatione praevia, et a quo peragenda;

f) an subiiciatur iuri patronatus; et an hoc sit ecclesiasticum, laicum vel mixtum.

2.—Quonam ex tempore beneficium vacet, scilicet quo die, quo mense, quo anno beneficium vacans factum sit.

3.—Modus vacationis quis sit:

a) an per mortem; et utrum per mortem in ipsa Urbe (cfr. can. 1436, § 1, n. 2), an extra Urbem;

b) num per renuntiationem, eamque factam in manus Ordinarii an Papae;

c) utrum per promotionem an per translationem, et utrum promotio vel translatio peracta fuerit ab Ordinario an a Romano Pontifice;

d) utrum per privationem factam ab Ordinario, an a Papa.

[1] *AAS*, XXXIV (1942), 113.

4.—Quinam sit annuus beneficii reditus, et utrum certus an uncertus: idest: una cum distributionibus si agatur de beneficio chorali, vel una cum incertis si agatur de beneficio cui animarum cura adnexa sit.

5.—a) nomen et cognomen candidati vel candidatorum eorumque parentum;
b) locus et dies nativitatis;
c) curriculum vitae, studia peracta, tituli academici, mores, animi indoles, officia exercita et servitia praestita.

6.—An candidatus possideat aliud beneficium et cuiusnam naturae.

7.—An candidatus pertinuerit ad aliquem Ordinem Religiosum, Congregationem aut Institutum; an rite dimissus fuerit vel *saecularizationis* indultum obtinuerit et quando; an alicui Dioecesi sit incardinatus. Haec de re accurate significandum erit quis sit Ordo, quae Congregatio, quod Institutum cui candidatus adscriptus fuerit, an in iis vota perpetua nuncuparit et quis horum exitus; ac praeterea declarandum, an in iis vota saltem temporaria, aut iusiurandum perseverantiae aut alias promissiones ad normam Constitutionum illius Ordinis, Congregationis vel Instituti emiserit, et an ab iisdem legitime dispensatus sit, si per sex integros annos eisdem ligatus fuerit (can. 642, § 2; Pont. Commissio ad Codicis canones authentice interpretandos, 24 Novembris 1920; *Acta Apostolicae Sedis*, vol. XII, p. 575).

. . . . . .

11.—Ut Summus Pontifex, quum agitur de beneficiis legi concursus non subiectis, libere eos eligere possit quos in Domino magis idoneos et digniores existimet, Revmae locorum Curiae tenentur *nomina suppeditare omnium Sacerdotum* qui, vacatione beneficii rite nunciata, supplicem libellum miserint ut sibi conferatur; vel, si nemo beneficium optaverit, significare debent *saltem tria nomina*, quatenus fieri possit, inter digniores, ad normam epistolae circularis Datariae Apostolicae diei 11 Novembris 1930, quae legitur in *Actis Apostolicae Sedis*, vol. XXII, p. 525; quae epistola expresse hac occasione confirmatur atque uti religiose servanda edicitur.

12.—Attamen de quocumque beneficio agatur, et praesertim si res sit de beneficio cum cura animarum, semper necesse est ut Revmi Ordinarii manifestent quem candidatum coram Deo digniorem ac magis idoneum iudicent: cuius sententiae Romanus Pontifex, pro sua sapientia et prout in Domino expedire iudicet, benigne solet opportunam rationem habere.

13.—Tandem Revmis Curiis in memoriam revocatur, taxas pro Bullarum Apostolicarum concessione *ad obolum Sancti Petri unice atque integre destinari*, easque ad hoc solummodo exigi, ut consulatur gravissimis necessitatibus in quibus ipsa Sancta Sedes magis magisque in dies versari compertum est. Quapropter Revmi Ordinarii rogantur ut, in Ecclesiae Sanctaeque Sedis bonum, a postulationibus mittendis vel commendandis, eo directis ut huiusmodi taxae aut condonentur aut reducantur, reverenter abstineant, peculiaribus circumstantiis exceptis, quas, si adsint, pro sua conscientia accurate exponant opus est.

Datum ex Aedibus Datariae Apostolicae, die 1 Ianuarii a. 1942.

F. Card. Tedeschini, *S.R.E. Datarius.*
I. Guerri, *Subdatarius.*

SECULAR

DECISIONS IN 1941 ON RIGHTS AND OBLIGATIONS OF RELIGIOUS SOCIETIES

Conflict of Law

Davis v. Turner, 148 S. W. (2) 256 (Tex. Civ. App.). The rules of a church, based on authority or on custom will be taken into consideration when not in conflict with the law of the land but only so far as to determine their effect on property rights. In this case, observance of church laws in election was in issue (with further issue of restraint from conversion of funds). No danger to property was shown. Therefore injunction closing the church was improvident.

Scott v. Cholmondeley, 18 A. (2) 617, 129 N. J. Eq. 152. No irreparable damage was shown to pecuniary rights of members where it was alleged that a usurping pastor had by his conduct caused a falling off in attendance and contributions, since the church building remained open, services continued, and creed was not changed.

First Free Will Baptist Church of Blountstown v. Franklin, 4 So. (2) 390 (Fla.). Expulsion of members by intermediate church association would not be disturbed by the court where the expelled members did not appeal to National Association of Baptist Churches, the constitution of which provided that it should have the right to settle questions of discipline on appeal from component bodies.

Mortmain

Marvel v. Sadtler, 18 A. (2) 231 (Del. Ch.). When church property is alienated to other religious or charitable uses (i. e., other than worship), the statute requiring property dedicated to worship to be held by a corporation organized under proper statutes is no longer applicable.

Shrader v. Erickson's Ex'r., 145 S. W. (2) 63, 284 Ky. 449. Where land was devised to a trustee for several churches, there was no violation of the statute prohibiting a church to hold more than fifty acres.

Sunday School Union of African M. E. Church v. Walden, 121 F. (2) 719 (C. C. A. Tenn.). In Tennessee a religious association may sue and be sued. The question of the right of the church to hold

land under the Tennessee Code could be raised only by the State; therefore, not by the Sunday School Association organized by said church in a suit referring to the control of the property.

In re Keefe's Estate, 89 P. L. J. 429 (Pa. Orph.). Since the act of June 20, 1935 (cf. THE JURIST, I [1941] 165-167), it is no longer required that church property be controlled by lay members, but each church may determine for itself proper authority to control; church property is therefore now governed by church law and churches are not differentiated in this respect from other voluntary associations. Canonical authority of bishop should be cited in the deed. This decision, of course, came from the lower court. In 1940, the Pennsylvania case, *Shipp v. Joseph,* 12 A. (2) 49, dealt with a situation in which it was decided that the bishop held only the bare legal title to a church and was not liable for the amount alleged to be due for construction. Even under the act of 1935, it would seem that the law must regard the bishop as trustee; otherwise, he could not convey title. The act therefore seems to have made little change in the *status quo.*

CORPORATE ACTION

Bahr v. Evangelical Lutheran St. John's Society of Poynette, 295 N. W. 700, 236 Wis. 490. Foreclosure and sale sustained against parsonage and church property because members had duly authorized president and secretary to execute mortgage to cover church property as well as parsonage.

Goodhope Colored Presbyterian Church v. Lee, 1 So. (2) 911 (Ala.). In order to cancel the evidence of the church's debt to a pastor, it sufficed to show a deed to him supported by consideration. The deed conveyed a house and lot. It was held good under rules of the Presbyterian Church and under a statute requiring a resolution at a properly announced meeting. Resolution was passed by unanimous vote at Sunday meeting after announcement of business in hand on two Sundays preceding.

Congregation of St. Augustine's Roman Catholic Church of Minster v. Metropolitan Bank of Lima, 32 N. E. (2) 518 (Ohio). An unincorporated religious association cannot sue or be sued in its own name, has no capacity to appoint an agent to purchase an organ and is not liable on the contract. On the contrary, in a 1940 Arkansas decision, the Supreme Court affirmed a judgment on a mechanics lien although the defendant church argued that as an

unincorporated society it was not liable to judgment—*Robins v. East Arkansas Builders Supply Co.*, 137 S. W. (2) 924. On similar grounds, a trustee of an unincorporated religious society was held not liable in *Mercantile-Commerce Bank & Trust Co. v. Howe*, 113 F. (2) 893 (C. C. A. Ark.) (1940). Under the laws of Arkansas the association could authorize him to execute note and mortgage on association's property. For similar reasons, an abbot was held, in a 1940 decision, to act not merely for himself but for the abbey if the latter does not, as an incorporated society, repudiate his unauthorized signing of a note—*Benedictine Society v. National City Bank of New York*, 109 F. (2) 679.

Membership

Housing Authority of New Orleans v. Merrett, 200 So. 311, 196 La. 955. In merging two churches it was not necessary to admit each member separately.

Morris v. Featro, 17 A. (2) 403, 340 Pa. 354. Tacit consent to failures in the observance of church laws on the part of the authorities was not conclusive as to Greek Uniat church's refusal of submission to those authorities and had no effect to change the original status of the congregation.

St. Michael's Greek Catholic Church of Mont Clare v. Gaydos, 58 Montg. 67 (Pa. Com. Pl.). Excommunicated trustees, ineligible to hold office, could not make expenditures of church funds for purposes alien to the principles of the church and were surcharged for counsel fees spent in furtherance of schism and for salaries paid cantor and priest ineligible for office because of excommunication.

Walker Memorial Baptist Church v. Saunders, 35 N. E. (2) 42, 285 N. Y. 462, affirming 17 N. Y. S. (2) 842, 173 Misc. 455, appeal denied 22 N. Y. S. 462, 259 App. Div. 1077. Trustees are managers of the religious corporation; the members form the legal entity. Members of the spiritual body, who complied with the other conditions as to age and financial support provided by statute, could not be expelled from membership in the religious corporation. However, where under the customs, practices and usages of the Baptist Church, a distinction is recognized between the spiritual body and the corporation, the minister is not an officer of the corporation and can not be dismissed by it.

Trustees of Pencader Presbyterian Church in Pencader Hundred v. Gibson, 22 A. (2) 782, sustaining 20 A. (2) 134 (Del.). Under the Delaware and Federal Constitutions, no one can be compelled to join any religious organization, to remain a member of it, to support it financially, or to attend any service. But when he joins, he surrenders freedom and must conform to the laws of the church so long as he wishes to enjoy the privileges which it confers. But as a member of a local church affiliated with a general denominational church, he has no property right in church assets actionable in the civil courts. The local church, in these circumstances, was not an independent organization and after schism was estopped from using property to promote doctrines at variance with those of general denomination, even though the latter doctrines as proposed by governing body were attacked in writing by some members of the general denominational church as being mere theories. The statute providing for management of temporalities by the election of trustees as a body corporate to hold property, aims at furtherance of religious belief and latter was intended to affect legal nature of corporation even though express dedication of property to this belief was not made, provided it could be inferred from its origin and continued use. Thus local church's property was held in trust for furtherance of the creed of the general denominational church. When local church adopts creed materially different from that of general body, secession results. It is free in this matter, but may not take church property, even if secession is unanimous, and interest of general church body permitted it to prevent such action by legal proceedings. If any exception is to be made in favor of property held for a special trust, local church must prove trust, not merely assert it or suppose its existence. Local church was not clothed with authority to determine regularity of the creed under a covenant which granted land to local church for use so long as the general denominational body was faithful to creed. It is the function of the court to determine whether creed or form of worship differs so materially from that intended by trust as to defeat the latter's objects; ultimately it accepts as to these matters the decision of the supreme judicatory of the general church.

Presbytery of Huron v. Gordon, 300 N. W. 33 (S. D.). Makes same assertion as court in previous case, that it can not settle ecclesiastical differences which gave birth to the controversy, but only the civil and property rights of the litigants. Local church,

though a corporation, was not an independent entity but an organism of general body for which it held its property, not otherwise expressly limited as to use, and it could not terminate that property interest by secession. This interest was actionable in legal proceedings and members of the local church could be enjoined from interfering with it. This meant no interference with constitutional right of religious freedom, since they could associate themselves with any religious group, without taking the property with them, even though their bounty was represented therein.

Master v. Second Parish of Portland, 124 F. (2) 622, affirming 36 F. Supp. 918 (C. C. A. Maine). Local Congregational and Presbyterian churches merged as Presbyterian. The Presbyterian church was sold, and on dissolution, the proceeds were to have been divided. The result in this case seems at complete variance with that in the preceding two, though the fact of merger enters into the present case, and may introduce the distinguishing feature. On merger it was held that there was no dedication of the property to the general denominational body of the Presbyterian church, but that the Congregational parish remained trustee after consolidation for the benefit of both groups; it did not become subject to the judicatory of the general body when the local church seceded. The emphasis is laid here on the independent character of the temporal corporation which is alleged to be capable of taking property, if not impressed with a trust, for purposes within its discretion, not necessarily those of the denomination, and that it did so in this case. It was further free to use property for religious purposes of its own and to maintain its minister and could not be enjoined from doing so by the general body.

Dissolution of Corporation

Terpening v. Gulf Lake Assembly of Michigan Conference of Methodist Protestant Church, 299 N. W. 165, 298 Mich. 510. This church assembly was incorporated under a statute providing for the incorporation of assemblies to promote religion for a period not in excess of thirty years. Its articles of association fixed this period as the term of its existence. Now it wished to be held a religious society with right to existence *in perpetuum.* It was shown to be engaged in numerous acts of administration necessary to conduct a summer resort and was held to be a summer resort association whose

charter was good for thirty years. Even though its property were united with that of another church it would not be impressed with a trust for the united church.

People v. Volunteer Rescue Army, 28 N. Y. S. (2) 994, 262 App. Div. 237, affirming 27 N. Y. S. (2) 632. State could proceed in equity before Supreme Court to seek dissolution even though no statutory procedure. Reason: violation of state laws and abuse of corporate powers in appropriating corporate funds to officers and in failure to keep proper books.

Sosna v. Fishman, 154 S. W. (2) 398 (Mo. App.). Proper sale of all realty of religious corporation would not effect dissolution, since the corporation may sell its property as the purposes of the corporation require. It is immaterial that religious services have been discontinued. The proceeds remain the property of the corporation and can not be distributed until after dissolution under proper statute or by *quo warranto* proceedings on the part of the State for alleged unlawful acts or misuser or nonuser of franchise.

New Jersey Baptist Convention v. Fidelity-Philadelphia Trust Co., 23 A. (2) 560, 130 N. J. Eq. 603, affirming 20 A. (2) 67, 129 N. J. Eq. 525. Upheld statutes as single in purpose which authorized a court of chancery to determine in a summary manner whether a church is extinct and to enter an order so declaring. The property transferred to the Baptist Convention was still subject to the claims of creditors of the original church, to be asserted in proper legal action. Until the proper decree was entered by the court of chancery, a legacy to the extinct church for a new church building could not be interpreted on the supposition that the church was extinct.

Breach of Condition

Home Savings and Loan Ass'n. v. Mount Zion Baptist Church, 299 N. W. 287 (Nebraska). Mortgagee was not entitled to relief in equity where he accepted mortgage on church building when latter had reverted to the State as part of the realty under conditional grant made by the State providing for such reversion if property was not used within a year for church purposes or if such use was abandoned for a year. A somewhat different view was taken of private conditional grants in two decisions rendered in 1940, in each of which there appeared some feature to distinguish the case from the instant case. In *First Presbyterian Church of Salem v. Tarr,*

26 N. E. (2) 597, the Ohio court held that property given for a parsonage vested an estate in fee and was not defeasible on failure of condition. The view was based on the absence of express provision for reversion to the heirs on default. Condemnation of a cemetery by the city was regarded as sufficient ground for preventing default in *Toole v. Christ Church, Houston,* 141 S. W. (2) 720. This was construed as rendering performance impossible. But the court denied the existence of a condition subsequent. In the case *In re Metz' Estate,* 18 N. Y. S. (2) 883, frustration of the religious purpose for which a pledge was made as one of many similar pledges was held to exonerate deceased's estate from payment of the pledge. A saving distinction was made in *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker,* 27 N. E. (2) 522, in which the Supreme Court of Illinois construed a condition in a gift making it valid so long as the property was used for a meeting house as not violated by the execution of an oil and gas lease.

Tort

Goldberg v. Agudath B'nai Israel Congregation, 34 N. E. (2) 73, 66 Ohio App. 379. Building code regulations for theaters are not applicable to church buildings; and statute requiring handrails " in " buildings does not require them on steps outside. In addition to lack of handrailing, petition charged a rise in the steps of more than seven inches, a doorway opening directly on stairway instead of on a platform or landing equal in length to the width of the door, and general negligence in maintenance. Facts held insufficient to show a duty owing to the plaintiff.

Weigel v. Reintjes, 154 S. W. (2) 412 (Mo. App.). The plaintiff, waiting to enter church, was forced back a step at a time by crowd leaving, stepping into a drainage channel and sustaining injuries in the fall. Action was against pastor. Demurrer overruled because the evidence and inferences were not so strongly against plaintiff as to leave no room for reasonable doubt. Whether she contributed to the action was for the jury to determine. She was an invitee. Though pastor was not an insurer, he owed invitees the duty of ordinary care to keep the premises in a reasonably safe condition.

Hromek v. Gemeinder, 298 N. W. 587, 238 Wis. 204. Where the complaint showed the corporate character of the defendant, the latter could not escape liability on the ground that it was religious society without pleading facts showing immunity from liability for common law negligence.

INCOME TAX EXEMPTION

Rev. Francis J. Ross, a priest of the Archdiocese of Philadelphia, filed a bill in equity with the Court of Common Pleas of Philadelphia County in December Term, 1940, praying for relief from the taxation of stole fees and Mass stipends under a regulation made November 2, 1940, by the Receiver of Taxes, in virtue of Section 6 of the Philadelphia Income Tax Ordinance of December 13, 1939.

The bill was dismissed by the Court sustaining preliminary exceptions to the effect the bill did not set forth facts showing a cause of action requiring equitable relief or entitling the plaintiff to the relief prayed for.

Appeal was made to Superior Court, October Term, 1941, which handed down a majority opinion through Justice Cunningham on April 22, 1942, reversing the decree of the lower Court sustaining the appellees' preliminary objections. The bill was reinstated and the appellees were ordered to answer over. A dissenting opinion was submitted by Justice Rhodes, joined by Justice Hirt.

The higher court referred to the regulations promulgated by the Commissioner of Internal Revenue interpreting the Federal Income Tax Act, which was relied upon in the lower Court and seems to have afforded the Receiver of Taxes the ground for his local regulation. That ruling of the Commissioner of Internal Revenue held that " marriage fees, baptismal offerings and sums paid for saying masses for the dead" constitute "compensation for personal service" within the meaning of the Income Tax Law. The Court said that neither that regulation nor any other cited by the appellees had been upheld in any judicial decision. It further noted a controlling difference between the Federal Income Tax Law and the Philadelphia Income Tax Ordinance: the former taxing both earned and unearned income from whatever source derived, while the latter's aim was to tax only earned income, i.e., salaries and net profits. The majority opinion also noted an apparent assumption in the lower Court that these offerings were the equivalent of salary, whereas they are independent of salary. That sum which is paid as salary by the parish is conceded by the appellant, in the view of the higher Court, to be subject to the local income tax. The gratuitous nature of the gifts withdraws them, in the opinion of the Court, from the proceeds of a profession which, arising under contract, should be computed in determining net profits.

This was precisely the point of departure in the dissenting opinion which held that money given for the performance of professional services of value, no matter how made or what it may be called, cannot be construed as a tax-exempt gift; such payment is earned income and not a gratuity. It is the fact that the gifts are made for services that constitutes them earned income, since it is an essential characteristic of a gift that it should be a transfer without consideration. The fact that a specified salary was made by the parish independent of the gifts is immaterial; both types of income are earned income and taxable.

DISTRICT OF COLUMBIA TAXATION

Senator Clark of Idaho on Wednesday, July 22, introduced, at the request of Senator McCarran, Chairman of the District Senate Committee, a bill aiming at restoring the tax-exempt status of numerous religious, educational, and charitable institutions which have been declared taxable by District officials. The District Bar Association pledged its aid to the District Senate Committee in preparing for the passage of the bill, and a special committee of attorneys has been appointed to work with the District Senate Committee for this purpose.

The view has been expressed that remedial legislation is needed in order to accomplish the obvious purpose of the exempting statute. Long understood in its clear intent, it has been administratively challenged by officials who refuse to concur in the traditional interpretation. (Cf. THE JURIST, I [1941], 169). Representative John W. McCormack, of Massachusetts, House majority leader, subscribes to this view. The administrative board chiefly involved is the Real Estate Tax Exemption Board. A similar bill was introduced in the House on July 18 by Representative John F. Hunter, of Ohio.

Rt. Rev. Michael J. Ready, appearing at the hearings on the Senate Bill as representative of the Administrative Board of Archbishops and Bishops of the National Catholic Welfare Conference, made several recommendations for adoption in the present legislation. The Senate bill states as one category of exempt property "churches". Msgr. Ready suggested that this should include "churches, houses of study required for religious education and training, and other buildings used for religious purposes (including

buildings and structures reasonably necessary and usual in the performance of the activities of religion) ". For institutions in which there is a " student-teacher relationship " as descriptive of educational institutions, he suggested " buildings used for educational purposes (including, but not limited to buildings and structures reasonably necessary and usual to the operation of a school, college or university) belonging to and operated by institutions not organized or operated for private gain." A new section was suggested to include under exempt properties, buildings and structures used for a combination of religious, educational and charitable purposes, " when owned and operated by institutions not organized or operated for private gain ". Opposition was expressed to Section 3 requiring an annual report to the Commissioners of the District of Columbia showing the purposes for which exempted property had been used in the course of the year.

Free Transportation in Washington

In a previous number of The Jurist, reference was made to the decision of the Attorney General of Washington that the statute providing for free transportation of parochial school children is mandatory on local school boards.[1] In a memorandum opinion issued by Judge John W. Wilson of the Superior Court for Thurston County, Washington, it was declared unconstitutional. The text of that statute is as follows.

"An act relating to the health, welfare and safety of children attending elementary school and high school in accordance with the laws of this state; and providing for the transportation of school children attending private or parochial schools in all cases wherein provision for transportation of children attending public schools has been made.

" *Be it enacted by the Legislature of the State of Washington.*

" Section 1. It is hereby declared to be the intent and the finding of the Legislature of the State of Washington that it is a matter of paramount concern to this state to provide an opportunity and adequate facility to every child of school age, in every school district within the State of Washington, to obtain and procure an education in the primary schools of this state, and it is also of vital importance to the State of Washington to avoid and minimize the multiple accidents and traffic hazards to which children of school age are subjected by the roads and highways of the state, and to promote the health, welfare and safety of the children attending elementary schools and high schools in accordance with the Laws of this state.

[1] Cf. The Jurist, I (1941), 273, 347. The statute was H. B. 108; Chapter 53, § 1, of the Laws of 1941; §§ 4776 a, 4776 b—Remington's Revised Statutes. Passed by the House February 20, 1941; by the Senate, March 5, 1941; signed by the Governor March 8, 1941.

"Section 2. Whenever any district school board shall, pursuant to any laws of the State of Washington, provide transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this state shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation as are provided for by such district school board for pupils attending public schools."

Free Transportation in California

The transportation statute of California, to which reference has also been made in The Jurist, reads as follows.[2]

"An act to add Section 1.92 to the School Code, relating to transportation of pupils to and from elementary and secondary schools other than public schools.

"*The people of the State of California do enact as follows:*

"Section 1. Section 1.92 is hereby added to the School Code, to read as follows:

"1.92. The governing board of any elementary or secondary school district may allow pupils entitled to attend the school of the district, but in attendance at a school other than a public school, under the provisions of Section 1.143, transportation upon the same terms and in the same manner and over the same routes of travel as is permitted pupils attending the district school.

"The allowance of this section shall be restricted to actual transportation when furnished by the district to children attending the district school and nothing herein shall be construed to authorize or permit in lieu of transportation payments of money to parents or guardians of children attending private schools."

Free Transportation in New Jersey

The statute providing for free transportation in New Jersey, also noted in a previous number of The Jurist, is stated in the following terms.[3]

"Whenever in any district there are children living remote from any school house, the board of education of the district may make rules and contracts for transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

[2] Cf. The Jurist, I (1941), 347. The statute is chapter 1249 of the 54th Session (1941). Approved by the Governor, July 19, 1941. Filed with the Secretary of State the same day. Section 1.143, to which reference is made in the statute provides for registration records of children attending parochial schools.

[3] Cf. The Jurist, I (1941) 347. The statute is Chapter 191, § 1, p. 581, of the Laws of 1941, amending 18: 14-8. Approved June 9, 1941. Effective July 1, 1941.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education."

Free Transportation in Oklahoma

The statute providing for free transportation in Oklahoma[4] was found unconstitutional by the Supreme Court of the State,[5] but has been appealed, with the permission of this Court to the Supreme Court of the United States. The statute is stated in the following terms.

"Whenever any school board shall, pursuant to this Section or to any law of the State of Oklahoma, provide for transportation—for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this State shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district board."

Free Water in Cleveland

The Supreme Court of Ohio upheld an ordinance of the City of Cleveland in a mandamus proceedings in behalf of six private institutions against the Director of Public Utilities of the City of Cleveland.[6] The ordinance, effective May 12, 1940, read as follows. "Section 2302-2-B. The director of public utilities shall cause water to be furnished free of charge to public schoolhouses within the territorial limits of the City of Cleveland, and to free public libraries within the territorial limits of the city which are supported in whole or in part by taxation." "Section 2302-2-D. The director of public utilities shall cause water to be furnished free of charge within the territorial limits of the City of Cleveland to parochial and sectarian schools; to colleges and institutions of higher learning chartered by the State of Ohio and operated not for private profit; to houses used exclusively for public worship; to lands used exclusively for graveyards, or grounds for burial of the dead, except such as

[4] Laws 1939, p. 183, § 1; in 1941 Official Statutes, Tit. 70, § 1196.

[5] Cf. The Jurist, II (1942), 188; the case is *Gurney v. Ferguson*, 122 P (2), 1002.

[6] Six separate plaintiffs v. *Hickey, Dir. of Pub. Util. of the City of Cleveland*, 138 Ohio St. 389.

are held by a person, company or corporation with a view to profit or for the purpose of speculating in the sale thereof; to hospitals operated not for profit; and to property belonging to institutions used exclusively for charitable purposes, which shall be deemed to include such institutions, agencies and associations as are operated not for profit and whose services are rendered gratuitously or for a nominal fee to the public generally or to any substantial portion thereof, without other limitations or condition than the need of those served in such services, including such institutions and agencies, for the purpose of definition only and not of limitation, as the various orphanages, day nurseries, community houses and social settlements, Salvation Army homes, Association for Crippled and Disabled and similar agencies."

The bill was before the Supreme Court twice. The first time [7] it overruled demurrers based on the primary proposition that water is property and the municipality has no authority to give it away, and on the following supporting arguments: the statute is beyond the power of the municipality; the private institutions are not connected with the city or devoted to municipal purposes; the grant amounts to a donation in cash, violates the trusteeship of the municipality in giving away property of the municipally owned utility held in trust for the citizens, and offends against Section 6, Article VIII, of the Constitution of Ohio, which prevents municipalities from becoming stockholders in or from furnishing money or credit to private corporations or associations.

As to the last point, the Court said it was not applicable to the present case in language or intention. As to the power of the City to enact the statute, the Court referred to Section 7, Article XVIII, of the Constitution, under which the City of Cleveland adopted its charter, Section 1 of which gives it the authority to acquire, construct, own, lease and operate and regulate utilities, the operation of which is to be accomplished under Section 5, Article XVIII, of the Constitution, by ordinance. The activity of the municipality in operating a utility is proprietary rather than governmental, and the only restraints upon the municipality in the operation of it is that the rates be reasonable and that there be no unjust discrimination among the customers, considering their situation and classification.

A new allegation was presented when the case came before the Supreme Court a second time, namely that a higher charge of five per cent was necessary, this probably to show discrimination. But the Court replied that neither the issue of the reasonableness of the higher rate nor the issue of unjust discrimination is thus pleaded and further that neither point was offered by argument of counsel for respondent.

Obscene Literature in Wisconsin

The Wisconsin Legislature amended the statutes on obscene literature in its 1941 Session.[8] It raised the acts prohibited from misdemeanors to felonies and added a section penalizing publishers. The penalties for all the felonies,

[7] *State, ex rel. Mt. Sinai Hospital, v. Hickey, Dir.*, 137 Ohio St., 474, 30 N. E. (2) 802.

[8] Cf. The Jurist, I (1941), 347. Assembly Bill No. 430. Chapter 322 of the Laws of 1941. Approved June 25, 1941; published June 30, 1941.

except the penalty decreed for the publisher, is stated as follows: "imprisonment in the county jail not less than 3 months or not more than one year or by imprisonment in the state prison not less than one year or not more than 5 years or by fine not less than $100 or more than $5,000." The act added to the list of prohibited acts *the mere possession* of the obscene matter and included in the latter representations tending (not *manifestly* tending, as in the previous law) to the corruption of morals (not merely tending to the corruption of the morals *of youth*, as in the previous law). In the section dealing with the posting of such matter, the exception in favor of works of art is deleted, and only the exception in favor of purely scientific works is retained. Under the old statute the following persons were guilty of the misdemeanor (now of the felony):

1. "Any person who shall import, print, publish, exhibit, sell or distribute (now also 'have in his possession') or give away any book or pamphlet, ballad, printed paper, moving picture or film, or other thing containing obscene language, prints, pictures, figures or descriptions ... tending to the corruption of ... morals ..., or shall introduce into any family, school or place of education, or shall buy, procure, receive or have in his possession any such book, pamphlet, ballad, printed paper, moving picture or film, or other thing, either for the purpose of loan, sale, exhibition or circulation or giving away, or with intent to introduce the same into any family, school or place of education".

2. "Any person who shall, in a public place, or on any fence or wall, or other surface, contiguous to the public street or highway, or on the floor, or ceiling, or on the inner or outer wall, closet, room, passage, hall, or any part of any hotel, inn, tavern, courthouse, church, school, station house, depot for freight or passengers, capitol or other buildings devoted or open to other or like public uses, or on the walls of any outbuildings, or other structure pertaining thereto, make or cause to be made any obscene drawing, or picture, or obscene or indecent writing, or print, liable to be seen by others passing, or coming near the same".

3. "Any person or persons, who shall put up, in any public place, any indecent, lewd or obscene picture, moving picture or film, or character representing the human form in a nude or semi-nude condition, or shall advertise by circulars or posters any indecent, lewd or immoral show, moving picture or film, play or representation".

4. "Any person who shall sell, lend, give away, or show, or shall have in his possession with intent to sell, give away, or show, or shall advertise or otherwise offer for loan, gift or distribution, any moving picture or film, book, pamphlet, magazine, newspaper, or other printed paper devoted principally to the publication of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime".

The previous penalties were as follows:

1. The penalty for those in class 1 and 2 was imprisonment in the county jail not more than one year or fine not exceeding five hundred dollars.

2. The penalty in class 3 was a fine of not less than twenty-five dollars nor more than three hundred dollars.

3. The penalty in class 4 was a fine of not less than fifty dollars nor more than five hundred dollars.

The amended act retains the provision for search: "and a search warrant may be issued by any justice of the peace, as in case of stolen or embezzled property, for search for such obscene literature, matter, or thing, and when found may be used in evidence and then destroyed by order of the court in which any case arising under this section shall be tried". This provision is appended, however, to the section dealing with only the first class of felons.

The new section reads as follows. "Section 2. Subsection (5) of section 351.38 of the statutes is created to read: (351.38) (5). The publisher of any magazine, pamphlet, book or other publication published within this state or imported into this state which is the basis for the conviction of any person under this chapter in any court within this state, shall be barred from distributing any subsequent issues of the prohibited publication within this state for a period of at least two years."

Chapter 579 of the Laws of New York for 1942, sponsored by Senator Buckley, and amending Section 11 of the Domestic Relations Law has been held unconstitutional as opposed to religious freedom. The ruling was made by Attorney General John J. Bennett in a case where the clerk of New York County refused to recognize ministers of an Episcopalian church duly incorporated because the church was not listed in the last Federal census, a condition imposed by the new statute to render ministers competent to act as official civil witnesses of marriage.

* * * *

The Supreme Court of Washington reversed the decision of the Juvenile Court of King County, Washington, which had judged itself competent to order the amputation of an enlarged arm of an eleven-year old girl on the recommendation of two physicians and in spite of parental opposition on the ground that the child was *dependent* as not receiving proper medical and surgical attention and as *destitute*, and determined that the home was unfit for the alleged neglect. Nevertheless, it did not appoint a guardian as required by statute in a case where a home is declared to be unfit. Indeed, there was no intent to remove the child from her home. The Supreme Court restricted the right of intervention on the part of the state to cases where the home is unfit because of the cruelty of the parents, their indisputably neglectful or vicious conduct. It said that parents can not be deprived of custody merely because greater care could be procured for the child if taken from them.

The District of Columbia Board of Education rejected the plan to release school children one hour a week for religious instruction at the request of their parents, expenses to be borne by the respective churches. The Board said that six days a year are already being lost by the employment of teachers in selective service and rationing registration, and that it could not sanction the loss of seven more days.

Registrants for selective service preparing for seminary studies in a recognized college or university may receive occupational deferment at the close of their sophomore year upon presentation of certificates from the proper authority in the church and from the seminary, the latter testifying that the student will be admitted for theological studies.

* * * *

An amendment on the tire rationing regulations, promulgated in "Victory", the official publication of the Office of Emergency Management, requires that doctors and clergymen shall show that the car is *absolutely* necessary in making professional calls because there is no other practicable means of transportation, with the exception that one who must answer emergency calls may obtain a certificate enabling him to use his car between his home, his office, hospitals, and sick rooms. To be eligible in any event it must be shown that the vehicle is used exclusively, not principally as heretofore, for professional services.

* * * *

An order of the War Production Board set June 23 as the date beyond which the use of critical materials would be forbidden in the fabrication of religious goods. The prohibition extended to the assembling of the parts of such articles. Aluminum, chromium, copper, lead, magnesium, nickel, rubber, tin, zinc, silk and alloy metals were classified as critical materials.

* * * *

On August 30, the Congress of Costa Rica repealed the anti-clerical laws passed under the influence of the so-called Liberalism of the last century. The laws repealed were those which prohibited the existence of monastic or religious orders and interdicted any meddling by the clergy in the direction of schools supported by Government funds. Previously legislation had been passed making religious education compulsory in official schools, except on written objection filed by parents, and had recognized degrees conferred by private colleges.

* * * *

The new Federal Penal Code of Switzerland prohibits under penalty the advertising or displaying of contraceptives or the unsolicited sending of them through the mails; similarly it forbids the possession, sale, or purveyance of immoral pictures, considering the offense aggravated if the victim is a minor under eighteen years of age.

* * * *

The Supreme Court in Mexico has ruled that priests have the right under the law of 1936 to acquire and administer property as individuals, though not as representatives of the church, without liability to nationalization of the property. It held also that while a school is subject to nationalization if its buildings are used for the administration, propagation or teaching of religion, it is not subject merely because it is conducted by Catholics even when priests are teachers.

* * * *

Most Rev. John de Jong, Archbishop of Utrecht, warns the Catholic physicians of Holland against affiliating with the "Netherlands Union of Sickness Fund Physicians", which he condemns as an instrument for the infiltration of Nazi principles into the fields of medicine and public health.

Reviews

BOOKS

MY PHILOSOPHY OF LAW, Credos of Sixteen American Scholars. Boston Law Book Co., Boston, Mass. Pp. xii, 321.

This symposium was compiled under the auspices of the Julius Rosenthal Foundation and consists of the theories of sixteen scholars, thirteen of whom are professors of law; two, professors of philosophy; and one, a practitioner philosopher. No judge is represented. The scholars are: Joseph Walter Bingham, Morris R. Cohen, Walter Wheeler Cook, John Dewey, John Dickinson, Lon L. Fuller, Leon Green, Walter B. Kennedy, Albert Kocourek, Karl N. Llewellyn, Underhill Moore, Edwin W. Patterson, Roscoe Pound, Thomas Reed Powell, Max Radin, and John H. Wigmore. Photographs of the contributors are included. None of the contributors is a foreigner. Those presented are conceivably well chosen as representing the various schools of legal philosophy in the United States. Though the Realists seem to predominate, one may say that here there are represented as many varying philosophies as there are contributors.

Bingham, Cook, Kocourek, and Moore feel that theorizing about the law can not become a science worthy of the name unless it adopts the methods of the exact sciences. Llewellyn also seems to anticipate that in the future at least legal science will be inductive. But from a pragmatic point of view he admits that as a current phenomenon the institution of law rests fairly exclusively on the judge and the lawyer, neither of whom is acquainted with the methods of the exact sciences. Moore is behavioristic in his position, measuring the nature of law by its active and passive relation to behavior. Dewey and Green offer an application of instrumentalism to law. In common with Cook, in attempting to place the determination of good and evil on results, they fail to evaluate their own standard, not indicating what results are desired. Fuller is negative throughout, specifying to what he is opposed, and betraying the suspicion that the methods of the exact sciences will not solve the basic problems of the social order. Dickinson, too, implicitly shows by his own methods that the philosophy of law

transcends the limited tools of the exact sciences. Powell is also negative, not to say cynical, implying even contempt for the attempt to construct a philosophy of law; law to him is the practical expression of the daily legal struggle. Wigmore offers an analysis of the field of law study which is strictly not philosophy but rather a clarification by division. The Scholastic viewpoint is presented by Kennedy.

THE QUEST FOR LAW. By William Seagle. New York: Alfred A. Knopf. Pp. xv, 439.

This work presents a competent study of the sociology of law, tracing recurring relations between the rise and development of legal institutions with reference both to one another, to environment and to social institutions. It opens no new fields but it is a thorough coordination of the pertinent literature. It fails to reveal any comprehensive hypothesis of the origins, purpose, or destiny of law. It is divided into five sections, "Elements of Law", "Primitive Law", "Archaic Law", "Maturity of Law", "Vanishing Points of Jurisprudence". Conclusions appear under the caption, "Justice according to Law".

The periods are characterized legally as the period of custom (primitive), of courts (archaic), and of professional lawyers (mature). The same periods appear under an economic classification as that of hunters and herdsmen, of feudalism and slavery, and of capitalism. No legal system, not even the common law of England, deserves preeminence. The doctrine of the single case, characteristic of the common law system, is obviously yielding to the authority of the legal expert. This outstanding mark of the common law, legal precedent, is absent from no system, and in general law is very much the same in them all.

Conquest is regarded as the chief factor in the origin of the state, and schedules of compromise as the basis of archaic codes. Penal law derives from class conflict, its rigor depending on the intensity of the latter. Heresy and treason were thus the outstanding crimes in the conflict between the subject and the theocracy on the one hand, between the subject and the absolute monarchy on the other. Theocracy is dated no earlier than the archaic period.

Rome does not deserve its reputation as the great lawgiver, since law was only an avocation and its great jurisconsults of the classical period were Orientals, with the exception of Paulus.

As a positivist the author is not concerned with the natural law theory, though at times he does appeal, perhaps unconsciously, to apparent *a priori* standards of justice. For example, in the conclusion he rejects the validity of the formula "justice according to law", because law is most evidently the all-controlling factor in totalitarian countries. Thus it is implied that law is not absolute but dependent upon some standard outside itself.

PERIODICALS

Jurisprudence

E. Adamson Holbel, "Fundamental Legal Concepts as Applied in the Study of Primitive Law"—*Yale Law Journal*, LI (1942), 951. The author accepts the view that legal behavior among primitives has been amply demonstrated and holds that its least common denominator is the same as that of law in civilized peoples. So the fundamental legal concepts of modern jurisprudence should provide the instruments for an ethnological jurisprudence. Wesley Newcombe Hohfeld's analysis of them provides a ready-to-hand set. He reduces all legal concepts to eight, in pairs of converses based on four fundamental legal relations, as follows:

Person A	*Person B*
1 Demand-right	5 Duty
2 Privilege-right	6 No-demand-right
3 Power	7 Liability
4 Immunity	8 No-power

[It can be seen that 1 and 6 are obverses; so 3 and 8; 2 and 5; and 4 and 7.]

Two additional points ought to be added: firstly, in society there is a series of sub-groups constituting the social Entirety; and secondly, four of the categories noted are active; four passive, not subject to direct legal enforcement.

The demand-right in civilized society creates a series of further demand-rights on courts and law-enforcing agencies; in primitive societies, it creates a privilege-right in the aggrieved and his kin to compel performance.

Anton Hermann Chroust (J.U.D., 1929, University of Erlangen [Germany]; Ph.D., 1931, University of Munich [Germany]; S.J.D., 1933, Harvard Law School) is the author of "The 'Ius Gentium' in the Philosophy of St. Thomas Aquinas" and "Aristotle's Conception of Justice" in the *Notre Dame Lawyer*, the former article in the November 1941 issue and the latter in the January 1942 issue. In the former the position of St. Thomas is shown to regard the *ius gentium* as a law somewhere between the natural law and human (positive) law. In the article in which he asks explicitly whether the *ius gentium* is one with the natural law (*Summa Theologica*, II, II, 57, 3), he declares that the former is a form of human law, while elsewhere he regards it as a form of "secondary" natural law (*Summa Theologica*, I, II, 95, 4), where he divides human law into the *ius gentium* and the *ius civile*.

In the article on Aristotle's conception of Justice, the author relies on the text of the Nicomachean Ethics and confines himself to a study of the second

of the two meanings which Aristotle finds in the term, namely, Equality or a "fair mean", the proportionate ratio of commensurable goods, as evident in the terminology, "a just wage". He adverts to the first meaning, that of moral justice, i. e., conformity to a standard, in developing his study of the term as Equality. Indeed, he says that the principle of Equality becomes actual in and through the principle of moral Justice, while the latter unfolds and manifests itself in the different forms of Equality. He holds them to be, in the view of Aristotle, merely two aspects of the same thing, i. e., the relation of the action to a standard, on one hand, and to an equilibrium of commensurable goods, on the other. The author adverts to the two main phases of Equality as considered by Aristotle, namely, distributive and commutative Justice, but denies that Aristotle attempted to "schematize his legal theory" according to this distinction. Rank or personality is the basis of the one phase; property, of the other; and Aristotle regards both as essential to moral order. Another means of distinguishing between them is that one is the Justice of the "private law" or the "voluntary transaction," while the other constitutes the Justice of the "public law". The former is the Justice of co-ordination; the latter, of subordination. Corrective Justice is a form of distributive Justice aiming at a restoration of balance through the principle of proportionate Equality.

Charles E. Clark, Judge, United States Circuit Court of Appeals for the Second Circuit, "The Function of Law in a Democracy"—*University of Chicago Law Review*, IX (1942), 393. Law is only a tool, not the driving force of a society, though man feels in it something partaking of the divine. It should be flexible, subject to the aspirations of the masses. In the United States, this is hampered by two obstacles: the gap between the people and their representative and the gap between the legislative and the executive branches. As to the first, by the time the representative takes his seat, world conditions and local views may have entirely changed and it is hard to tell how far the executive represents the popular will. Then the responsible heads of the important legislative committees are those who have achieved their posts through seniority and are opposed to the later view as represented by the executive. Perhaps a parliamentary system would be the corrective, where the executive must be always responsible to the electorate and at least the legislative heads must be in step with the executive.

Hans Kelsen, "The Law as a Specific Social Technique"—*University of Chicago Law Review*, IX (1941), 75. Regulation or order makes a social phenomenon out of the biological phenomenon of men's living together, and that order induces under sanction and by a set of norms both the positive and negative behavior required. The order therefore is a coercive order and law is its means of coercion, a coercion or sanction that is social as opposed to transcendental. Considered in this sense, the natural law is not law, as it supposes an order in which force even as a sanction is not needed, the order of the anarchistic state or of the dictatorship of the proletariat. Law regulates its own creation whether by custom or by statute. It is applied in three phases: the ascertaining of the delict; the order for the application of the sanction; and the execution. The relation between delict and sanction is

subject to change: originally penalty was the sole sanction; now the civil imposition of damages is a sanction. In primitive orders, the sanction was applied to the kin; now, only to the delinquent. Absolute liability of the delinquent is also now modified by a consideration of his culpability. Noncentralization of law-creation and law-application also has yielded to centralization in legislature, judiciary, and executive.

K. N. Llewellyn, "On the Good, the True, the Beautiful, in Law"—*University of Chicago Law Review*, IX (1942), 224. Adverts to the three style periods noted by Dean Pound: the "formative era" (the first half of the nineteenth century); the period of the "maturity of law" (from 1880 to 1900); and the modern "sociological" period. "Formative" refers to content rather than craftsmanship though the word suggests the flavor of the style of the latter. The second period was one of consolidation by cutting down rather than by development. Its style was authoritarian, formal, logical. The basic element in the style of the latest period is conscious and overt concern about policy due in part to a realization that the materials of the preceding period are inadequate to the problems heaped up by two succeeding generations and to the reform which for three decades has been in progress. A second characteristic is a dependence on technical data and expert opinion. The good for the judge is to stay within the limits of his office; for the legislator, to stay within the limits of the constitution. The good to be achieved by law turns about five themes: to clean up disputes; to channel and re-channel conduct so as to avoid them; to determine the governing voice in case of trouble and the procedures to make it effective; to coordinate the human factors towards the exercise of initiative; to provide for the functioning of the legal machinery. The promotion of Justice is a phase of the Good to be sought by law through legistive justice or the change of law.

Ole E. Wyckoff, "Our Changing Common Law"—*West Virginia Law Quarterly*, XLVIII (1941), 24. In the sixteenth and seventeenth centuries there was a movement to supersede the common law by a public law on Romanist lines based on centralized royal authority and administrative supremacy; in the seventeenth, eighteenth and nineteenth century, to reject judicial precedent; and later, to adopt the system and refined academic conceptions of the modern-Roman law accompanied by statutory enactments. Two present movements in the United States are the reversion to the union of administrative and judicial functions and the recall of judges for political expediency. Always reforming legislation has exerted influence, not to mention commentaries and other works of legal literature. In correcting erroneous precedents and extending legal principles to meet an expanding civilization care must be taken to preserve the safeguards of the common law.

Huntington Cairns, "The Popularization of Law"—*Michigan Law Review*, XL (1942), 560. Shows that the requirements for popularization are the same as that for good writing in general: the gift of intelligibility and possession of the synoptic mind, or the ability to see a subject as a whole and in perspective. In addition to its social ends, those evident in the exercise of the profession, law has intellectual ends, better known in the Greek and Roman world, and these should in turn be means to good writing, since they result in the formulation of clear ideas devoid of irrelevancies and in the acquisition of a sense for style.

Brendan F. Brown, "The Place of the Catholic Law School in American Education"—*University of Detroit Law Journal*, V (1941), 1. Notes three periods in American Catholic legal education: the originating period (1869-1929); the aspirant period (1929-1941); and the retrenchment period. The first marked a struggle for survival, with imitation of the secular schools in pedagogical function. The second marked the introduction of a Thomistic historico-philosophical criterion and attempts at greater influence in the profession characterized by approval of fifteen of the nineteen Catholic law schools by Association of American Law Schools, the national accrediting agency. The third, or present period, is marked by the necessity of curtailing the efforts of the aspirant period because of political and military turmoil.

John Henry Wigmore, "My Philosophy of Law"—*Docket*, VI (1942) 6. To avoid the confusion often found in treatises on law, the author classifies the subdivisions of the Science of Law (which he calls *Nomology*) according to the different activities of thought which deal with a concept of law.

1. *Nomoscopics* (ascertaining the law);
   a) *Nomostatics* [*fontes cognoscendi*];
   b) *Nomogenetics* [*fontes essendi*];
   c) *Nomophysics* (correlation with other subjects);
2. *Nomosophics* (ascertaining the law's fitness);
   a) *Nomocritics* (logical study of cohesion);
   b) *Nomothetics* (ethical inquiry);
   c) *Nomopolitics* (economical and political inquiry);
3. *Nomodidactics* (private exposition of the law);
4. *Nomopractics* (execution of the law);
   a) *Nomodikastics* (judicial application);
   b) *Nomopoietics* (formulation by legislative action).

Robert D. Abrahams, "The Neighborhood Law Office Experiment"—*University of Chicago Law Review*, IX (1942), 406. Discusses establishment of offices in local neighborhoods by seven Philadelphia attorneys, under auspices of a Committee of the Philadelphia Chapter of the Lawyers Guild. Offices were simply furnished, aims were to test whether the public wished a service it had not been receiving, whether the householder was accustomed to consult his lawyer in important affairs, whether the practice of preventive law was desirable, and whether this practice would be helpful to the economics of the profession, particularly in aiding young lawyers to obtain a practice. Two thousand clients have been served in two years and four out of five had never been to a lawyer's office before. Since most of the work is preventive, those who came would probably not have called on other attorneys. So it is not likely that the fee level for the remainder of the bar will be diminished.

William F. Clarke, "Dependence of Law and Lawyer"—*Georgetown Law Journal*, XXX (1942), 624. The remedy in the individual case litigated is not to be taken as a remedy which will satisfy society, though it may satisfy even the party who loses the case. Even the rank-and-file lawyer, who is not expected to be a profound student of jurisprudence, should desire the best remedy at law for social ills and should think in terms of legal values in the light of social needs. This is amply illustrated in the despair the layman

feels over the efforts of trained international jurists, enjoying professional knowledge of particular circumstances and technicalities but oblivious of common sense and common decency.

Government

George Jaffin, "New World Constitutional Harmony: a Pan-Americanadian Panorama"—*Columbia Law Review*, XLII (1942), 523. Argues for the study of South American constitutions which he maintains are a common denominator far superior to language inasmuch as they are derivatives of the American Constitution. A Pan-Americanadian Union would be found to be a more logical institution than an Anglo-American Union or a Pan-Hispanic Union. But even if such a union is found attainable only in the distant future, comparative constitutional study will be informative to the American as to developments in South American Constitutions especially as to the machinery for the protection of the Bill of Rights. The Uruguayan Constitution of 1934, for instance, extends protection to "life, honor, liberty, security, labor and property" even to non-citizens; and gives suffrage to persons who have lived there fifteen years. In Mexico and Cuba, the question of a law's constitutionality can be directly presented to the court, while Cuba in its Constitution of 1940 created a special Tribunal of Constitutional Guarantees.

Kenneth Culp Davis, "Dean Pound and Administrative Law"—*Columbia Law Review*, XLII (1942), 89. Criticizes Dean Pound's latest condemnation of administrative absolutism in an address in the November, 1941, issue of the American Bar Association Journal. Dean Pound found too great a tendency on the part of administrative adjudication to proceed without hearings or by hearing one party often in the absence of the other or by reports not divulged to an interested party. He cited the report of the Attorney General's Committee on Administrative Procedure as proof, though the Committee arrived at a different conclusion. So does the author of this article saying that the Committee understood the facts and looked fairly at them.

Edward W. Bailey, "Dean Pound and Administrative Law—Another View" —*Columbia Law Review*, XLII (1942), 781. Tries to clear Dean Pound of the charges made in the article of Mr. Davis or to show that the matter is at least debatable. The latter denies that it is even debatable in the same number of *Columbia Law Review* (p. 804).

Constitutional Law

Charles B. Nutting, "The New Court and the Spirit of Laws"—*Georgetown Law Journal*, XXX (1942), 610. The new court is not on a higher plane than the old as far as the exercise of judicial power is concerned. Both courts have shaped legislation to accord with preconceptions. This is chiefly evident in the supposed attempt to get at the intent of the legislature. An objective standard, the meaning of the words, is rejected. So, too, a subjective standard actually based on extrinsic evidence of legislative intention. The standard used is a subjective one found in the minds of the judges. This is but the expression of judicial policy under the guise of interpretation; in effect, the exercise of a common law power of expanding precedent by a court that

denies it has common law powers and in the case of a precedent that is judicial and not legislative.

John T. Ganoe, "The Passing of the Old Dissent"—*Oregon Law Review,* XXI (1942), 285. Harmony on the Supreme Court is not necessarily to be desired. Constitutional law should evolve but it should retain traditional fundamental principles. The court should not be expected to reflect the wishes of the majority alone but rather to protect the rights of the individual. In the dissent lies, perhaps, the real function of the court in the American system, permitting the factors working towards both stability and evolution to operate in a balanced system. It is through the dissent that the court begins the process of adjusting its decisions to changed conditions. Controversy develops around divided opinions but this very controversy is the field in which stability and change operate on each other. Virtual unanimity creates the danger that these basic elements leading to balance will be destroyed.

Francis X. Conway, "A State's Power of Defense under the Constitution" —*Fordham Law Review,* XI (1942), 169. Studies the domestic defense forces organized by several states to supply the place of the National Guard when the latter was ordered into federal service. What is the constitutional basis for such action and how far are these units subject to the control of the Federal Government? The militia, imported from England, consisted of all men capable of bearing arms, of whom a number were selected by voluntary enlistment or conscription, and more efficiently trained but, in England, only for defense in the respective counties in case of urgent necessity certified by Parliament. In any event they could not be sent out of the kingdom. In the Constitutional Convention, a compromise agreement surrendered a limited control over the militia to the Federal Government, but it did not intend to deprive the states of their sovereign right to maintain their own militia, as should be amply clear from the Second Amendment. And the prohibition against the maintenance of troops by the states refers to a standing army. The National Defense Act of 1916 seems to involve a usurpation of control by Congress not authorized by the Constitution. It enacts that no state may maintain troops in time of peace except the National Guard according to the organization prescribed by Congress. It provides that it shall not be construed as limiting the rights of the states in the use of the National Guard in time of peace and specifically excepts the maintenance of state police or constabulary. Congress may have inserted these provisions because it recognized the limitation of its powers. But a recent amendment expressly authorized organization and maintenance by the state of military forces other than the National Guard while the latter is in active service of the Federal Government. If the states have the right to organize their own defense units without the permission of Congress, then it seems that Congress has attempted to exercise an authority it does not possess.

Constitutional Law — Due Process — Statute Permitting Sterilization of Habitual Criminals without Individual Findings that Defendants' Anti-social Traits Heritable Held Valid—*Harvard Law Review,* LV (1941-1942), 285.

In *Skinner v State* ex rel. *Williamson,* 115 P. (2) 123, (Okla. 1941) (5-4 decision) the Supreme Court of Oklahoma held to be valid sterilization act

of 1935 (Okla. Stat. Ann. [1936] tit. 57, §§ 171-95), under which the appellant was to be sterilized because, as a defendant convicted once for chicken stealing and twice for robbery, he was found to be a habitual criminal. This finding was made by a trier of fact who also found that the appellant's health would not be injured by the operation.

The Court upheld the act as not violating the *ex post facto* or cruel and unusual punishment clauses of the Oklahoma Constitution because it is eugenic and not penal, and as not violating the state and federal due process clauses because the court assumed that the legislature was acting on the view that habitual criminals will likely beget criminal offspring to be a burden on society.

This decision is criticized because the Court ignored established biological opinion that it is still impossible to reach valid generalizations concerning the heritability of criminal tendencies. Studies in this field recognize that there are no comparative statistics showing the relation of law-abiding to criminal ancestors in the blood strain of criminals. It seems settled, moreover, that a criminal trait as such can not be inherited. Examination in individuals cases can according to authority, determine a probability that the criminal's descendants will have criminal tendencies and statutes based on such findings have been upheld as not offending against the due process clause.

The statute therefore seems not eugenic but penal and as such opposed to the *ex post facto* and the cruel and unusual punishment clauses.

This decision was also criticized in *The University of Chicago Law Review*, IX (1941), 145. The statute is analyzed as undoubtedly penal and as such unconstitutional both as an *ex post facto* law and as cruel and unusual punishment. This view is arrived at by contrasting it with the statutes providing for the sterilization of mental defectives, which contain an upper age limit beyond which the sterilization can not be performed and a provision that the operation can be performed only when the defendant is discharged from the institution of which he has been an inmate. Both these elements show a eugenic purpose as contrasted with a different purpose evident from their absence in the Oklahoma statute.

The decision of the Supreme Court of Oklahoma is the first to uphold a blanket compulsory sterilization act, though there are acts in Nebraska and California which have not been challenged as to their constitutionality. The Nebraska act (§§ 83-1504) provides for the castration of male sex offenders and the California act (§ 645, Penal Code) provides compulsory sterilization of those guilty of carnal abuse of a female child. Both provisions require a court order and make the operation part of the sentence. Indeed, there seems to have been no effort to enforce either. A blanket provision is one that provides for the operation without a special investigation, administrative or judicial, in the individual case. Such an investigation is required in the sterilization statutes of all other states, whether the statute apply to mental defectives or criminals. The standard was set by the Virginia mental defective sterilization act which was upheld as constitutional by the Supreme Court of the United States in *Buck v. Bell* (274 U. S. 200 [1927]). This statute provided for an administrative finding, subject to the review of the courts, that the mental defective was "the probable potential parent of socially inadequate

offspring likewise afflicted". Findings in such proceedings would touch especially the persistence of criminal traits throughout several generations. The Wisconsin act (§ 46.12) and the South Dakota statute (§§ 30.0501-14) do not require a finding as to inheritability; the former requires a finding as to the advisability of procreation; the latter, as to whether the defective can properly perform the duties of a parent. [Statute declared unconstitutional by the Supreme Court of the United States—Cf. THE JURIST, II (1942), 312.]

William G. Fennell, "The 'Reconstructed Court' and religious Freedom: the *Gobitis* Case in Retrospect"—*New York University Law Quarterly Review,* XIX [1941], 31. The case in question is said to afford an excellent opportunity to study the approach of the "liberal constitutionalist" jurist to the problem of the conflict between rights of conscience and the demands of the State. This is the view of Chief Justice Stone, dissenting in the instant case, as opposed to the "liberal democratic" position of Justice Frankfurter. The latter would limit the function of the Supreme Court to keeping open the avenues of democratic expression through which unconstitutional legislation can be democratically corrected. The former would extend that function to a supervision over legislation itself, so as to guarantee the freedom of mind and spirit even in the case of minorities against the encroachment of a police power authorized by legislation in turn dependent upon political majorities. The case itself extended the power of police far beyond its limits of protecting public health, welfare, safety, and morals, to include the promotion of national cohesion and national unity, and legislation tending to these objectives is held to be due process.

Case Comment: Curtailment of Speech Inciting to Race Hatred and the Protection of Minorities—*Columbia Law Review,* XLII (1942), 857. In *State v. Klapprott,* 22 A. (2), 877 (Sup. Ct. N. J. 1941) a conviction was dismissed because the statute under which obtained was held to violate the right of free speech guaranteed by the New Jersey and Federal Constitutions and was further void for vagueness. The statute made it a misdemeanor to utter statements inciting to hatred because of race, color, religion, or manner of worship. The defendants were Bundists who were accused of making anti-Jewish statements at a Bund meeting. In its decisions on the constitutionality of statutes restraining freedom of speech, the Supreme Court upholds those that aim at a clear and present danger of serious injury to the state, and more recently those that aim at evils that threaten to bring about destruction of life or property, or invasion of the right of privacy, or breach of the peace. Prior to this relaxation, statutes attempting to restrain speech provocative of violence were generally subjected to a test of arbitrariness or unreasonableness, i. e., as a test of its compliance with the requirements of due process. Moreover, a "narrowly drawn statute", i. e., one aimed at a specific evil, abridging free speech incidentally, is accorded favorable interpretation. This statute is said by the commentator to involve preventive action against threats to the constitutional rights of weaker groups, and not to be unreasonable as means of attaining this end, which is admittedly within the State's power; it is said to be a "narrowly drawn statute," to aim at a clear and present danger of destruction of life or property, and even, in war time at least, at a clear and present danger of disunity in the state.

Comment: Recent Ramifications of the Application of Free Speech Doctrines to the Protection of Picketing—*Michigan Law Review*, XL (1942), 1200.

Case Notes: Secondary Picketing—Unity of Interest between Manufacturer and Retailer—*Michigan Law Review*, XL (1942), 603.

Case Notes: Anti-Picketing Injunction under State Anti-Trust Act—*The North Carolina Law Review*, XX (1942), 434. These studies are correlated as dealing with the Supreme Court decisions on the right to picket in general and on the right to picket persons only indirectly involved in the labor dispute. In an instant case, *Carpenters and Joiners Union of America, Local 213 v. Ritter's Cafe*, 62 S. Ct. 607, the Texas court granted an injunction under the Texas anti-trust statute and was upheld by the Supreme Court of the United States on the ground that the Texas statute, as applied in this case, constituted a valid regulation rather than an unconstitutional denial of the freedom of speech. The case involved this set of facts: the cafe was picketed because a contractor hired by the cafe owner to erect a building not connected with the cafe had hired non-union labor for the construction of this separate and independent building. In 1940 by two decisions the Supreme Court held that picketing *per se* presented no such "clear and present" danger as to justify a statute prohibiting all picketing, peaceful or otherwise. These decisions have been regarded as shifting the burden from the Unions, which previously had to prove the legality of their action, to the State, which must now prove that anti-picketing legislation does not infringe labor's constitutional rights under the First and Fourteenth Amendments. In 1941 a decision of the Supreme Court extended the constitutional right to picket even to cases in which the employer-employee relation was not present. But the Supreme Court seems in the instant case to have stopped short of endorsing the secondary boycott as within the rights of labor under the First Amendment. Though the secondary boycott has been held by a Federal court to be in itself a clear and present danger to the State as a primary attack upon society itself, the majority of courts which have enjoined peaceful picketing in such situations consider the unlawful aspect of the secondary boycott as such. Some courts have attempted a compromise, holding a secondary boycott not illegal where there was a community of interest between a manufacturer and an independent retailer whose premises were picketed and where the picketing was directed against the non-union product and not the retailer generally. This necessary unity was conceived to exist only where a retailer resold for profit the product of a non-union disputant, thereby receiving an economic advantage through lower prices. It has been held to exist between the installer of a burglar alarm system and the premises protected, and between a window cleaner and his customer, etc.

James J. Kearney, "Digest of Church Law Decisions of 1940"—*Notre Dame Lawyer*, XVI (1941), 318. Reviews judicial reports of 1940 including *Minersville School District v. Gobitis* (310 U. S. 586, 60 S. Ct. 1010; cf. THE JURIST, I [1941], 31-38, 362; upholding school board's right to require flag salute); *Cantwell v. State of Connecticut* (310 U. S. 296, 60 S. Ct. 900; cf. THE JURIST, I [1941], 49, 362; denying right of administrative official to approve solicitation of funds for religious purposes); *Schneider v. New Jersey* (308 U. S. 147, 60 S. Ct. 146 [1939]; cf. THE JURIST, I [1941], 49; also disapproving restriction

of fund solicitation); *State ex rel. Johnson v. Boyd,* Same *v. Viets,* Same *v. Krack* (28 N. E. [2] 256; cf. THE JURIST, I [1941], 370; where the wearing of religious garb was held not to affect the nature of schools as public schools); *Kay v. Board of Higher Education of City of New York* (173 Misc. 943, 18 N. Y. S. [2] 821; cf. THE JURIST, I [1941], 371-373; the case where Bertrand Russell's appointment was held noxious to the people of the State of New York); *Wall v. Board of Regents of University of California* (102 P. [2] 533; where the writ of prohibition of the appointment of Bertrand Russell was denied).

MARRIAGE

Case Notes: Validity of Mexican Decree—*University of Cincinnati Law Review,* XVI (1942), 257. In *Bobala v. Bobala,* 68 Ohio App. 63, 33 N. E. (2) 845. The husband pleaded a Mexican divorce in bar of the wife's proceedings for divorce, custody of the child, and support. *Held,* the Mexican court had no jurisdiction of the subject matter, since the husband had not established a "residence" in Mexico, and jurisdiction could not be conferred by consent of the parties. As to foreign countries, recognition of their divorce is based not on the full faith and credit clause of the Federal Constitution but merely on comity, and the laws of domicile in most of the States of the Union are stricter than those of Mexico. Consequently Mexican divorces are seldom held valid in the United States. Of course, if a State permitted no divorce at all, it would not recognize a Mexican divorce, though it would probably be obliged to recognize the divorce granted in another State of the Union under the full faith and credit clause as adjudicated in relation to divorce by the Supreme Court of the United States. But this adjudication requires for such recognition that the divorce be granted in the state of the last marital domicile, unless both parties reside in the State where granted. However, a State *may* go farther than this in recognizing divorces under the principle of comity, provided due process has been observed, but it is not obliged to do so under the full faith and credit clause as interpreted above. Though not noted by the commentator, the Supreme Court requires recognition if personal service has been made, or if the defendant appears in the litigation.

Comment: Recognition of Foreign Divorce Decrees—*The North Carolina Law Review,* XX (1942), 294. In *State v. Williams,* 220 N. C. 445, 17 S. E. (2) 769, conviction of bigamy was sustained against a man and woman who had deserted their spouses, gone to Nevada, obtained divorce there and married there when only constructive service, i. e., by publication, was made to the deserted spouses. North Carolina does not recognize such service and therefore is free, under the ruling of the Supreme Court either to recognize or to refuse recognition to such marriages. Note is made that in the Restatement of Conflict of Laws there is a suggestion that the State be required under full faith and credit clause to recognize a divorce obtained in place of libellant's separate domicile if the other party has either consented to or given cause by misconduct for that separate domicile. Notes further that estoppel is applied by the courts to prevent attack on the subsequent marriage by those who have obtained the invalid decree and to those who benefit from it by remarrying. Adverts also to the absence of the *animus manendi* necessary for domicile but absent in those who remain in a jurisdiction but six weeks

and obtain a divorce based on domicile with conceivable connivance of the courts.

Case Comment: Enforcement of a Foreign Alimony Decree where Parties' Circumstances Have Changed—*Columbia Law Review*, XLII (1942), 1046.

Case Comment: Enforcement and Interpretation of Foreign Decree for Payment of Alimony in Installments—*Michigan Law Review*, XL (1942), 596. Both studies consider the case, *Dyal v. Dyal*, 65 Ga. App. 359. 16 S. E. (2) 53. In this case the Georgia court interpreted the decree of a Florida court imposing alimony of $30.00 a week payable to the wife to whom the custody of the three children was entrusted, with reductions of $7.50 upon the remarriage of the wife, or the death, marriage, or majority of the children. On a suit for back payments, the husband proved that the wife had abandoned the children and that he had been supporting them, whereupon the Georgia court interpreted the decree and ordered him to pay only $7.50 a week to the wife as her portion of the original allotment. The court insisted that it was interpreting not modifying the decree lest it offend against the full faith and credit clause. In virtue of that clause, it lacks authority to refuse judgment for alimony installments awarded by the court of a sister State and overdue unless the latter by statute or by the terms of the decree retains the power retroactively to modify the decree. This modification by implication seems fraught with danger because it might tempt the father to take custody where he has no right, raising the problem of determining when abandonment is abandonment. It should be restricted therefore to the case where a third person could recover for the support of the children. Perhaps the instant case might have been handled by allowing the support of the children as a set-off for the father against the overdue payments of alimony.

Edward S. Stimson, "Law Applicable to Marriage"—*University of Cincinnati Law Review*, XVI (1942), 81. Criticizes the view that parties to a marriage are ruled by the law of their domicile rather than of the place where the marriage occurs. The majority of the decisions hold the opposite view. The minority frequently refer to a fraudulent or evasive purpose of the parties in leaving the territory of domicile. This seems irrelevant. Either they remain or do not remain subject to the law of domicile and if they do, they are ruled by it no matter how praiseworthy their motive may have been in leaving their own state. It is significant that the uniform marriage evasion act adopted substantially by five states between 1912 and 1915 has been adopted by no others since then. It is incorrect to assume that the state retains power over those who reside in it after they have left its territory. To apply the law retroactively would lead to confusion as the decision would depend on the jurisdiction in which the case was tried.

Notes: Effect of Annulment on Separation Agreement—*Columbia Law Review*, XLII (1942), 301. In *Adams v. Adams*, 1 All. Eng. Rep. 334 (C. A.), wife sued, after annulment, for £1 a week, settlement made at separation because of her inability to consummate marriage. There seems to have been a lack of knowledge at the time of settlement that a decree of nullity could be obtained, but this was not a mistake of fact but a mistake of law. It was held that since the marriage was not void but only voidable, the settlement held and was valid. It was argued that the husband would have been liable for the

wife's debts. Had the marriage been void for bigamy or affinity, the settlement would probably have been held invalid under precedent. The court distinguished the case from a *marriage* settlement as this was a separation settlement. The precedent in *marriage* settlements might seem to be the contrary even as to a voidable marriage. The problem has not been presented to American courts, the majority of which will not grant alimony after the annulment of even a voidable marriage, though in one case it was stated incidentally a separation agreement made in consideration of the procurement of an annulment would stand. In American courts the enforceability of a separation agreement is generally unaffected by adultery or divorce. The commentator argues for validity even when the marriage is void, basing his view on the manifest policy of the decisions, that is, the support of the wife in a *de facto* marriage.

Statute Notes: Insanity as a Ground for Divorce—*Texas Law Review*, XX (1941), 106. Discusses H. B. 124, 47th Legislature, Regular Session of the Legislature of the State of Texas, amending Article 4629 of the Revised Civil Statutes and permitting divorce for insanity. Writer notes that this also reinstates right to divorce for act committed by insane spouse prior to insanity, and this prior to the expiration of the five years in an asylum required for divorce on the ground of the insanity itself. The personal representative of the insane person, however, can not obtain divorce in his name against the sane spouse, and therefore the latter may inherit even though unworthy. This has been changed in some jurisdictions by statute or by judicial decision.

Case Notes: Prenuptial Agreement as to Marital Domicile — *Texas Law Review*, XX (1942), 482. In *King v. King*, 57 T. L. R. 529 (P. & D. 1941) a prenuptial agreement of an aged man to reside at the domicile of the woman was upheld and his going to his own home was held to be a desertion of her. Texas permits the making of these agreements, if not contrary to good morals or to some rule of law, though the common law rule is that executory contracts are extinguished by marriage except those settling property rights at the expiration of the marriage. In the instant case, the right of the man to choose the domicile might conceivably have been taken as a rule of law contrary to the agreement. An argument in favor of the decision that was not employed might have been that American courts have restricted this right of the husband by permitting the wife a separate domicile, for the purposes of obtaining a divorce, for misconduct of the husband, and even, in one case, for convenience upon mutual agreement.

Tort

Torts — Liability of a Charitable Hospital for Injuries Caused by X-ray burns. — Timothy M. Green, *Notre Dame Lawyer*, XVII (1942), 272. The actions in almost all cases are said to have been against the operator. In *Marble v. Nicholas Senn Hospital Association of Omaha* (102 Neb. 343, 167 N. W. 208) the hospital was held liable to a physician invitee who was injured in a fall due to an X-ray shock sustained while holding an infant patient so that its head could be X-rayed. In *Ritchie v. Long Beach Community Hospital Association* (139 Cal. App. 688, 34 P. [2] 771), where the patient died under an operation for the removal of an ulcer caused by an

X-ray burn, the hospital was held not liable under the general doctrine that charitable institutions are not liable for the torts of their servants as to patients. Implied waiver by the patient seems to have been the basis on which the hospital was held not liable in *Berkowitz v. City of New York* (13 N. Y. S. [2] 864—1939); *Schloendorff v. Society of New York* (211 N. Y. 125, 105 N. E. 92); and *Phillips v. Buffalo General Hospital* (239 N. Y. 188, 146 N. E. 199).

Case Notes: Liability of University for Negligence of Instructor—*Texas Law Review*, XX (1942), 505. In *Brigham Young University v. Lillywhite*, 118 F. (2) 836 (C. C. A. 10th, 1941), the Utah rule was followed which does not grant immunity to charitable institutions. Texas, it is noted, grants partial immunity under its decisions, exempting them from liability to beneficiaries if there has not been negligence in the selection of the negligent servant. The commentator notes that the cases are illogical in holding a charitable *corporation* liable for the negligence of one agent charged with hiring but not for the negligence of another agent actually administering to the patient. The commentator suggests a rule on which the university might have been held exempt in the instant case, that is, by regarding the instructor as an independent contractor, as a physician in a hospital, because the university does not retain the right to determine the detailed manner in which he shall conduct his courses.

Evidence

Case Comment: Admissibility of Hospital Records as Business Entries—*Michigan Law Review*, XL (1942), 1105. In *Reed v. Order of United Commercial Travelers*, 123 F. (2) 252. Trial court excluded record of intoxication as an observation rather than a diagnosis. Reversed, because it was admissible as "a memorandum of any act, transaction, occurrence, or event" as defined in the Federal statute, assuming that a diagnosis is admissible. In Pennsylvania courts, if the diagnosis is complicated, the diagnostician, whether called upon to testify or not, must be qualified as an expert, though some courts assume that the statute admitting the record meant to abrogate the common law rule requiring that an expert be qualified. However, the diagnostician should not be required to appear for cross-examination. A majority of the States do not yet have a statute permitting business records to be admissible and even in those that do have such a statute, the courts adopt a strict interpretation.

Chronicle

GENERAL

On July 9, George Achates Gripenberg, Finland's first Minister to the Holy See, arrived in Rome.

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An August 18, His Excellency, the Most Rev. Apostolic Delegate, opened the 60th annual convention of the Knights of Columbus at Memphis, Tenn., celebrating the Pontifical Mass and speaking at the States Dinner, at which other speakers were Most Rev. William L. Adrian, D.D., Bishop of Nashville, host to the convention, Postmaster General Frank C. Walker, and Francis P. Matthews, Supreme Knight.

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His Eminence, Sebastião Cardinal Leme de Silveira Cintra, Archbishop of Rio de Janeiro, was named Papal Legate to the Brazilian National Eucharistic Congress, held at São Paulo in September.

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On June 15th the 27th annual convention of the Catholic Hospital Association of the United States and Canada met in Chicago. The convention opened with a Pontifical Mass celebrated by Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago. The sermon was delivered by Most Rev. Edwin O'Hara, D.D., Bishop of Kansas City. Rev. Alphonse M. Schwitalla, S.J., was reelected president.

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Most Rev. John J. Glennon, D.D., Archbishop of St. Louis, was host to the 87th annual convention of the Catholic Central Verein of America and 26th convention of the National Catholic Women's Union, August 22-26. Most Rev. Edwin V. O'Hara, D.D., preached the sermon at the Pontifical Mass with which the convention opened.

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On June 11, in the presence of a large number of fellow Bishops, Most Rev. John B. Morris, D.D., Bishop of Little Rock, celebrated his golden sacerdotal jubilee. The sermon was preached by Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago.

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On July 29 Most Rev. Joseph R. Crimont, S.J., Vicar Apostolic of Alaska, celebrated his silver episcopal jubilee in St. James' Cathedral, Seattle. He is eighty-four years old.

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The Bishops' War Emergency and Relief Committee continues to distribute the proceeds of its collection, disbursing $220,000.00 in addition to $1,000,000.00 allocated last year. $100,000.00 has been given for the relief of Polish refugees in Russia, $50,000.00 for American prisoners of the Japanese, and $25,000.00 to the needs of Hawaii.

One June 16 Most Rev. Joseph Kutka, Bishop of Kaisedorys, Lithuania, died at the age of 69. He had been Bishop of the See since 1926.

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Most Rev. Maturin Guilleme, Titular Bishop of Matra, retired Vicar Apostolic of Nyassaland, died in Nyassaland at the age of 83.

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According to *L'Osservatore Romano*, the following deaths among the members of the European Hierarchy occurred in the last year. Most Rev. Leo Wetmanski, D.D., Titular Bishop of Camaco and Auxiliary of Plock, Poland, previously reported as deported and then as held in a concentration camp, died October 10, 1941. Most Rev. Stephan Misic, D.D., Bishop of Mostar, Jugoslavia, died on March 26 at the age of 83. Most Rev. Eugene Crepin, D.D., Auxiliary of Paris, on Holy Thursday; Most Rev. Jean Baptiste Gonon, D.D., Bishop of Moulins, France, in April at the age of 73; Most Rev. Antonio Augusto de Castro, D.D., Bishop of Oporto, Portugal, on March 29; Most Rev. Giovanni Battista Girardo, D.D., Bishop of Pavia, on April 18.

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Rt. Rev. Msgr. James C. Byrne, Vicar General of the Archdiocese of St. Paul, died June 13 at the age of 83.

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Garret William McEnerney died on August 2 at the age of 77. He was counsel for the United States, representing the Catholic Bishops of California in arbitration between the United States and Mexico at The Hague in 1902 in the claim to the Pious Fund of the Californias, an endowment for the California Missions confiscated by Santa Ana in 1842 in the sum of $1,700,000.00. In 1902 the Tribunal of The Hague ordered the accrued interest to be paid by the Mexican Government to the United States for the Catholic Church in California.

DIGNITIES

Most Rev. Daniel Mannix, D.D., Archbishop of Melbourne, has agreed to act as Vicar Delegate for American chaplains. He is already Chaplain General of the Australian military forces.

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Most Rev. Joseph Frings has been consecrated Archbishop of Cologne in Berlin by Most Rev. Cesare Orsenigo, Apostolic Nuncio to Germany. He succeeds the late Cardinal Schulte who died last year.

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Rt. Rev. Msgr. Norbert Robichaud, Vicar General of Bathurst, has been named Archbishop of Moncton, and Rev. Camille LeBlanc, rector of the Cathedral of Moncton, has been named Bishop of Bathurst.

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Three bishops have been named in Colombia: Rev. Geradro Martinez, of the Diocese of Santa Rosa de Osos, becomes Bishop of Garzon; Rev. Julio Caicedo, a Salesian Father, becomes Bishop of Barranquilla; and the Very

Rev. Angel Maria Ocampo, Jesuit Provincial, becomes Titular Bishop of Jonopolis and Coadjutor of Socorro and San Gil.

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L'Osservatore Romano records the following changes in the European Hierarchy. Most Rev. Antonio Aksamovic, D.D., was transferred at his request from the Diocese of Srijem, Jugoslavia, to the Titular See of Augustopolis, Phrygia. Most Rev. Jon Scheffler, D.D., professor of canon law at the University of Kolozsvar, was named Bishop of Satu Mare, Rumania. Most Rev. Adelchi Albanensi, D.D., Bishop of Balnoregio, was transferred to the See of Viterbo and Tuscany. Most Rev. Tommaso Leonetti, D.D., Bishop Delegate of Montefiascone, was promoted to the See of Ferentino. Canon Eduardo Martinez Gonzales was named Auxiliary of Toledo, Spain, and Canon Daniel Llorente Federico, Auxiliary of Burgos, Spain.

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A new Vicariate Apostolic, Fangsiangfu, has been established in China and entrusted to the Friars Minor of the native Chinese Province. Rev. Philip Wangtaonan has been named Vicar Apostolic and Titular Bishop of Athribis.

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Msgr. George Petit, Vicar General of Chalons-sur-Marne, has been named Titular Bishop of Leuce and Coadjutor with right of succession to Most Rev. Charles Ginisty, Bishop of Verdun.

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On July 1, Rt. Rev. John d'Alton, former president of Maynooth College, was consecrated Titular Bishop of Binda and Coadjutor Bishop of Meath by Most Rev. John McQuaid, Archbishop of Dublin.

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On July 6, Most Rev. Emmanuel Galea was consecrated Auxiliary to Most Rev. Maurice Caruana, Bishop of Malta.

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On June 20 it was announced that the following priests of the Diocese of Harrisburg had been elevated to the rank of domestic prelate: Very Rev. James F. Clarke, Very Rev. Patrick F. McGee, and Very Rev. George J. Breckel.

INDEX TO VOLUMES I–II